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IN THE

Supreme Court of the United States

October Term, 1960
No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

STATEMENT OF JURISDICTION.

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PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

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CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

STATEMENT OF JURISDICTION.

Opening Statement.

This is an appeal from the judgment of the District Court of Appeal of the State of California in case 2d Civil No. 24314, People of the State of California v. City of Los Angeles, *et al.*, Van M. Griffith, defendant and appellant, filed May 8, 1960. Petition for hearing to the Supreme Court of the State of California was denied on June 2, 1960. Notice of appeal to the Supreme Court of the United States was given and filed on August 5, 1960.

Appellant Van M. Griffith submits this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below.

The opinion of the District Court of Appeal is not yet officially reported. It is unofficially reported in 179 A. C. A. 629 and in 4 Cal. Rep. 531. It is also appended hereto as Appendix A to this Jurisdictional Statement.

Statutory Provision.

The statutory provision believed by appellant to confer jurisdiction on this Court is 28 U. S. C. 1257(2).

Nature of Proceeding.

This appellant as reversioner of defeasible fee or grant upon conditional limitation appeals from final judgment of appellate state court affirming condemnation for state highway and freeway use of lands already appropriated by defendant City of Los Angeles for use as a public park known as Griffith Park. Said lands were conveyed to said City of Los Angeles by the donors (privy to appellant) upon the conditional limitation that they would immediately revert to donors or their heirs whenever the lands ceased to be used exclusively for park purposes. Said judgment denied and wholly rejected appellant's claim and demand of compensation for the taking of said lands reverted to him by plaintiff-appellee People of the State of California.

Federal Questions Presented.

I. Whether the taking in condemnation of the land given and dedicated as a public park and diverting it to other different and inconsistent uses of a state highway and freeway without compensation to appellant-reversioner is in violation of the Fourteenth Amendment of the Constitution of the United States; in that,

(a) The deed of gift accepted by defendant-appellee City provided that "whenever said tract of land hereby conveyed, or any part thereof, shall cease to be used as a park, . . . then the lands hereby conveyed shall immediately . . . revert to" the donors or their heirs; that appellant is the heir of said donors; that said conveyence is a conditional limitation or defeasible fee which vests immediately upon the happening of the event or contingency and the estate granted is at an end without any further act of the reversioner; that plaintiff took possession and completed construction of said freeway before the trial of this action; that the park land taken for said freeway had ceased to be used as a park before the trial and before the time fixed for the valuation and award of damages, and by the law of the State of California title does not pass to the condemnor until entry of judgment and payment of compensation; and therefore appellant-reversioner was the fee owner of said park land taken for said freeway at the time of passing of title to plaintiff-appellee and is entitled to compensation for the value of the park land taken; that appellant made timely claim for such compensation; that he raised the federal question aforesaid and it was considered by the state court adversely;

(b) that Riverside Drive was a park roadway within said Griffith Park and was a part of the lands

granted and conveyed to appellee City of Los Angeles exclusively for public park purposes as aforesaid; that said Riverside Drive is taken by said plaintiff-appellee for said freeway without any compensation therefor, and without eminent domain proceedings but claimed as "subject to an easement or prescriptive right of the public for use" as streets or highways; that said state highway and freeway is constructed upon and over said Riverside Drive and other adjoining park lands of said Griffith Park; that the taking of said Riverside Drive without compensation was objected to by appellant in this condemnation proceeding and he claimed damages therefor; that judgment adverse to appellant's said claim was rendered by the trial court and affirmed by said state appellate court and is a taking of appellant's said property for public use without just compensation.

II. Whether this defendant-appellant has been denied due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States; in that,

(a) Said decision affirmed the judgment of the Superior Court denying appellant leave to file cross-complaint alleging collusion and conspiracy of plaintiff-appellee Department of Public Works acting for the State of California and defendant-appellee City of Los Angeles illegally to take and divert said public park land of Griffith Park to the other different and inconsistent use for said state highway and freeway and that the taking of said land already appropriated to public use exclusively as a public park is in violation of the Fourteenth Amendment of the Constitution of

the United States and praying for damages for said taking;

(b) The action of the State Highway Commission and Department of Public Works of the State of California arbitrarily and in excess and abuse of its authority under law to take property already appropriated to public park use for state highway and freeway violates the specific trust and dedication by which said property was acquired by defendant-appellee City of Los Angeles from the donors with whom appellant is in privity as their heir and reversioner and deprives him of his property without due process of law; that said question of due process was raised in appellant's answer and in said proposed cross-complaint, adjudged adversely to him by the trial court, and said judgment is affirmed by the appellate court of last resort of the State of California;

(c) That appellant's said reversionary right under the said deed of gift and dedication of the said park land taken in condemnation for said state highway and freeway is taken without compensation therefor, evidence offered by appellant of the value of said land taken was excluded, appellant assigned said exclusion of evidence as error, and said assignment of error was considered by the appellate court and decided adversely to appellant, and appellant was thereby denied the right to be heard as to his right to compensation and the value of said park land taken.

III. Whether the obligation of the said contract of gift and dedication of Griffith Park by the donors to defendant-appellee City of Los Angeles is impaired by the subsequent passage of the state laws held valid by

said decision of the District Court of Appeal now appealed from, to wit:

(a) Section 103.5 of the Streets and Highways Code of California which provides "that the Department of Public Works may acquire any property dedicated to park purposes, however it may have been dedicated when the State Highway Commission has determined by resolution that 'such property is necessary for state highway purposes' ";

(b) Resolution of said State Highway Commission designating and determining that the taking of said public park property for state highway purposes is a more necessary public use than its already appropriated use by appellee City of Los Angeles for a public park;

(c) Ordinance of the City Council No. 107485 and Resolution No. 2859 of the Board of Recreation and Park Commissioners of the City of Los Angeles consenting to and aiding said taking and the diversion of said public park lands to the other different and inconsistent public use for said state highway and freeway, notwithstanding the provision of the City Charter enacted by the state legislature and constituting a term, condition and part of said contract which authorized appellee City of Los Angeles to accept such gift of land to be dedicated as a public park and to remain thereafter forever to the use of the public inviolate and the provision of the California Constitution that such City Charter so enacted is without power of the legislature in itself or its agency to amend, alter or repeal; which said statutes were passed and enacted after the making of said contract.

How Said Federal Questions Are Raised.

The federal questions are raised as follows:

1. Appellant's original answer alleges the impairment of the contract of the gift and dedication by said taking, collusion of plaintiff and defendant City illegally to divert said park property to said use as state freeway in violation of the City's trust [C. T. p. 32, par. VIII] as set forth in the deed of gift [C. T. p. 32, par. IX] and contrary to the provisions of the City Charter [C. T. p. 34, par. XI], and prays for injunction.

2. Soon after the construction and completion of the freeway and the consent of defendant City to the taking, appellant moved the trial court for leave to file cross-complaint against plaintiff and defendant City, alleging the construction and completion of said freeway [C. T. p. 156, par. V], that the said taking is in violation of law and the City Charter [par. VI], that the state freeway is not a more necessary public use than the said public park use [par. VII], that the act of the Department of Public Works of the State of California in said taking was an abuse of discretion, arbitrary and capricious [par. VIII] and *ultra vires* and in violation of the Fourteenth Amendment of the United States Constitution, and the unconstitutionality of Section 103.5 of the California Streets and Highways Code [C. T. pp. 156-157, par. IX], the collusion of plaintiff and defendant City to take said park lands and divert them to the state freeway in breach of said

trust and in violation of said City Charter [C. T. p. 158, par. XII], and praying damages for said taking [C. T. p. 163].

3. Appellant filed objections at the pre-trial conference, alleging change of status and new facts entitling him to allege ownership of said park lands and right to cross-complain against plaintiff and defendant City, and that by denial thereof he is denied his day in court [C. T. p. 180]. In the subsequent trial appellant renewed said objections and claimed right to file said cross-complaint [R. T. pp. 28-38], which request was denied [see also R. T. p. 145].

4. In the Findings of Fact the trial court found that the taking for state highway purposes is a more necessary use than that to which it was already appropriated and that said Section 103.5 of the Streets and Highway Code is not unconsitutional [C. T. p. 101, par. IV], that said taking is not in violation of the City Charter [C. T. p. 102, par. VII], that said taking in condemnation has not and will not cause a reversion of any part of Griffith Park to the heirs of grantors [C. T. p. 105, par. IX], that the contract of defendant City "to expedite the construction" of said freeway "shall not be cause for reversion" of any part of Griffith Park [C. T. p. 106, par. XI]; and the Conclusions of Law in effect follow said Findings [C. T. pp. 109 *et seq.*].

5. In Appellant's Opening Brief (Points XIX, XX, and XXI, pp. 38-40), he raised the federal questions, to wit:

(a) The taking of Griffith park lands without compensation to the owner-reversioner in violation of the Fourteenth Amendment of the Constitution of the United States;

(b) Violation of the due process clause of the United States Constitution (Fourteenth Amendment) by denying leave to file cross-complaint, not conforming to the procedural requirements of Section 1240 of the California Code of Civil Procedure, by arbitrary action of the State Highway Commission and Department of Public Works of the State of California, taking said park lands without legal authority and by unconsititutional application of Section 103.5 of the California Streets and Highways Code;

(c) Impairment of the obligation of the contract of gift (in violation of Article I, Section 10, of the United States Constitution) by the subsequent passage of Section 103.5 of the California Streets and Highways Code, the resolution of the California State Highway Commission under assumed authority of said statute, the passage of City Ordinance No. 107485 and Resolution No. 2859 of the Board of Recreation and Park Commissioners of the City of Los Angeles, consenting to and aiding said taking without authority and in violation of its City Charter.

Assignments of Error and Decision of Appellate Court.

The way in which the assignments of error (set forth in appellant's briefs) were passed upon by the District Court of Appeal is as follows: The Court said in its opinion:

> "Appellant's assignments of error are lengthy, consisting of some 22 separate points . . . his primary attack lies against various findings and procedural errors of the trial court, . . . his main complaint goes to the right of the State or acquire park property for state highway purposes, and his right as the reversionary heir to compensation for the taking."
>
> ". . . for the moment disregarding the controlling Section (103.5), the State did properly acquire the land for 'a more necessary public use' under Section 1240(3), Code of Civil Procedure. . . . Appellant argues that under Subdivision 2, Section 1240, Code of Civil Procedure, 'land belonging to any incorporated city which has already been appropriated to some public use may not be taken under the eminent domain provision.'"
>
> "Appellant complains that the taking violates the City Charter providing that all lands dedicated as a public park shall forever remain to the use of the public inviolate (Section 170(b)(3))."
>
> "Related closely to this issue is appellant's claim that the trial court erred in denying leave to file a cross-complaint, and excluding evidence on the issue of bad faith and abuse of discretion."

"Inasmuch as the determination of necessity for the taking for highway purposes is, under the circumstances alleged in appellant's cross-complaint, conclusive under section 103.5, and bad faith and abuse of discretion, conspiracy and bad motive of the condemning body are not justiciable issues, neither was it error for the trial court to exclude evidence on these matters."

"Although appellant urges '(T)he taking of Riverside Drive within Griffith Park' to be error, . . . the State, under the authority hereinabove set forth, has as much right to take the same as any other portion of the park."

"He says, in support of his reversionary right to the land in fee that the 1896 City Ordinance accepting and dedicating the 300 acres as a park and the 1897 deed conveying the same to the City were merged into the deed of 1898, which conveyed a determinable base fee and controls the entire grant; and argues that the construction of the state highway in the park, and the City's execution of the 'Freeway Agreement', its abandonment of certain pleaded defenses in its answer and its acquiescence in the diversion of the property, caused reversion of the land to him. We find no merit to either position." "We hold that the appellant has no interest of any kind in the fee estate which might justify his participation in the award." "Any reversionary right appellant may have had under the 1898 deed was extinguished at the time the State condemned the interest of the City, for the seizure was of the entire title by the single act of appropriation."

As recognition that appellant raised the federal question, the Court's opinion states the fact that

> "appellant moved for leave to file a cross-complaint against plaintiff and the city, alleging a reversionary right and damages for its taking, the State's violation of the charter, and state and federal constitution, the unconstitutionality of Section 103.5, the abuse of discretion and arbitrary acts of the Department of Public Works, the availability of better alternative routes, a conspiracy of the city and state to divert park lands, and the city's lack of good faith in defending against the State's taking. The motion was denied."

Also:

> "'The universally recognized rule that the power of eminent domain is paramount to the right secured by the obligation of contract clause, and its exercise in no way interferes with the inviolability of contracts (*Pennyslvania Hospital v. Phildelphia*, 245 U. S. 20; 38 Supreme Ct. 35; *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390; 32 Supreme Ct. 267; 12 Am. Jur. 22, Sec. 394), precludes any holding that the Resolutions of the Commission are unconstitutional as impairing the obligations of the contract between the donors of Griffith Park and the City of Los Angeles"

Cases Believed to Sustain Jurisdiction.

The cases believed to sustain the jurisdiction of the jurisdiction of the United States Supreme Court are:

1. The taking of Griffith Park lands without compensation to the owner-reversioner is in violation of the Fourteenth Amendment of the Constitution of the United States.

Harris v. Elliott, 10 Pet. (U. S.) 25, 55 *et seq.*;

United States v. 2,184.81 *Acres of Land*, 44 Fed. Supp. 681;

Romero v. Department of Public Works, 17 Cal. 2d 189.

2. Appellant has been denied due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States:

(a) by denial of leave to file cross-complaint,

People v. Buellton Development Co., 55 Cal. App. 2d 178;

Calif. Code Civ. Proc., Secs. 442, 1246, 1246.1, 1247, 1248, and 1256.

(b) by the arbitrary and *ultra vires* action of the California Highway Commission and Department of Public Works:

Davidson v. New Orleans, 96 U. S. 97, 108;

Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, 523, *et seq.*

(c) by taking for state highway public park lands of defendant City not in conformity with procedural

requirements of Section 1240 of California Code of Civil Procedure as to eminent domain proceedings.

Marin County Water Co. v. Marin County, 145 Cal. 586.

(d) by exclusion of evidence of value of land taken.

Olson v. United States, 292 U. S. 246, 259.

3. Section 10 of Article I of the Constitution of the United States is violated by the impairment of the contract of gift made inviolate by the California Constitution and the City Charter through subsequent legislation held valid by the court's decision, to wit:

(a) Section 103.5 of the California Streets and Highways Code subsequently passed.

Tidal Oil Co. v. Flanigan, 263 U. S. 444, 451 *et seq.*

(b) The Resolution of the California Highway Commission is a "state statute".

Live Oak Water Users' Assn. v. Railroad Commission, 269 U. S. 354, 356 *et seq.*;

Lake Erie & Western Railroad Co. v. State Public Utilities Commission, 249 U. S. 422, 424;

Holloway v. Purcell, 35 Cal. 2d 220, certiorari denied 340 U. S. 883.

(c) City Ordinance No. 107485 and Resolution No. 2859 of the Board of Park and Recreation Commissioners of the City of Los Angeles are "state statutes".

Railway Express Agency v. People of the State of New York, 336 U. S. 106, 107 *et seq.*;

King v. City Council of Augusta, 277 U. S. 100,

Poulos v. State of New Hampshire, 345 U. S. 395, 402;

Jamison v. State of Texas, 318 U. S. 413, 414.

(d) The constitutionality of a statute may be questioned as to its application in a particular case.

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 288 *et seq.*;

Rindge Co. v. Los Angeles County, 262 U. S. 700.

State Statutes Involved.

The state statutes involved are:

Section 103.5 of the California Streets and Highways Code, providing as follows:

> "that the Department of Public Works may acquire any property dedicated to park purposes, however it may have been dedicated, when the State Highway Commission has determined by Resolution that 'such property is necessary for state highway purposes'."

Resolution No. 2859 and Ordinance No. 107485 of the City of Los Angeles, consenting to and adding said taking, being certified Exhibits R and S.

Section 113 of Los Angeles City Charter, adopted January, 1889, pursuant to Section 8 of Article IX of the California Constitution, and a part of the terms and conditions of said deed of gift and dedication, provided as follows:

> "All lands and real property located in the City of Los Angeles and which have been heretofore, or which may be hereafter, set apart and dedicated for

the use of the public as a public park or parks, shall forever remain to the use of the public as such park or parks, inviolate, and no part of said lands shall ever be used or occupied for any other purpose."

Section 170 of the Los Angeles City Charter is set forth *in haec verba* in appellant's original answer [C. T. p. 34 *et seq.*, par. XI].

The Federal Questions Are Substantial.

It is obvious from the opinion of the District Court of Appeal and its decision that this case necessarily involves the federal questions raised of just compensation, due process of law, and impairment of contract, and that these questions are determinable of all the issues in this case, to wit:

1. Said opinion expressly refers to Exhibit G, the deed of gift, and its provision that "the lands be used exclusively as a public park, and 'upon further condition' that the name Griffith Park be retained by the City; and whenever any part of the land shall cease to be used as a park and if the name ever be changed by the City, it shall immediately, upon the happening of either event, revert to the grantors or their heirs." (This quotation is from the opinion and varies somewhat from the deed). Said opinion also states that appellant as heir of the donors contends that said deed "conveyed a determinable base fee", and that the taking of the park land and construction of the freeway thereon "caused reversion of the land to him", and that therefore he became entitled to damages for said taking. In appellant's assignments of error he set forth the said taking as being in contravention of the Four-

teenth Amendment of the Constitution of the United States.

2. As pertinent to the question of impairment of contract, said opinion treats said Section 103.5 of the California Streets and Highways Code as the "controlling" legislation upon which the Court's decision rests, and as overriding and superseding the provisions of the City Charter that "all lands dedicated as a public park shall forever remain to the use of the public inviolate." Appellant contends that the said provision of the Los Angeles City Charter entered into and is a term of the contract between the defendant City and the donors of the park, and that Section 8 of Article XI of the California Constitution by virtue of which said Charter was granted prohibits any repeal, alteration or modification of said Charter by such statute as said Section 103.5 or any legislative act of an agency of the state, and this constitutional provision distinguishes this case from the line of cases which hold that the power of eminent domain is immune from application of the clause of Section 10 of Article I of the Constitution of the United States. In appellant's assignments of error he maintained the unconstitutionality of said Section 103.5 as contravening said Section 10 of Article I of the Constitution of the United States.

3. On the question of due process under the Fourteenth Amendment of the Constitution of the United States, appellant in his assignments of error set up several grounds, to wit:

(a) The denial of appellant's motion for leave to file cross-complaint was made very soon after the completion of the construction of the freeway and the con-

sent of defendant City thereto, and in effect that denied appellant's right to contest the title of defendant City to the park land taken by and through its abandonment of the park use and its consent to diversion thereof to the freeway use.

(b) The exclusion of evidence on the issue of the arbitrary, oppressive and *ultra vires* acts of the Department of Public Works and the State Highway Commission of California is also related to the denial of leave to file cross-complaint which expressly alleged violation of said Fourteenth Amendment.

(c) Appellant contends that Section 1240 (subdivision 2) of the California Code of Civil Procedure, as theretofore interpreted by the California Supreme Court, forbids taking in eminent domain of lands of a municipality already appropriated to a public use, and consequently that this action is without due process of law and is further in conflict with Section 13 of Article XI of the California Constitution which prohibits such delegation of power to the California State Highway Commission.

(d) On the theory that appellant was not entitled to damages as reversioner or owner of said park lands and that there had been no reversion thereof, although the land taken had been diverted to the different inconsistent use of the state freeway, evidence was excluded and not given as to the value of said lands taken for the freeway, and appellant contends this is a denial of due process of law.

Said final decision on these federal questions is adverse to appellant, and he claims right to review thereof by this Honorable Court.

We submit that these federal questions have substantial importance both as to the preservation and protection of private property rights and the public interest and welfare in that they affect private donations of property to public use, for if public property so dedicated may be diverted to inconsistent public uses it will discourage such gifts, and if the arbitrary decision of a special commission such as the California State Highway can with impunity take and divert such park lands without compensation to the donor or reversioner there will be no security for the preservation of park and recreation lands so dedicated to public use.

Conclusion.

Appellant maintains that said decision should be reversed and remanded for new trial of the issues involved, and that appellant be given permission to prove his damages.

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.

ARTHUR E. BRIGGS,
Of Counsel.

APPENDIX.

Opinion of the District Court of Appeal.

[Civ. No. 24314. Second Dist., Div. One. Apr. 8, 1960.]

The People ex rel. Department of Public Works, Respondent, v. City of Los Angeles *et al.*, Defendants; Van M. Griffith, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County. Kurtz Kauffman, Judge. Affirmed.

Proceeding to condemn realty for highway purposes. Judgment for plaintiff affirmed.

Arthur E. Briggs for Appellant.

George C. Hadley, George Miley and Charles E. Spencer, Jr., for Respondent.

Lillie, J.—The state, through the Department of Public Works, sued the city of Los Angeles, Van M. Griffith, and others to condemn their interests in certain lands known as Griffith Park for the construction of a state highway. After a trial without a jury, judgment was entered condemning the land to plaintiff, awarding the city the sum of $3,750,000 and denying defendant Griffith compensation. He alone appeals from the judgment.

The within litigation arose out of the state's condemnation of approximately 200 acres of land within Griffith Park maintained by the city of Los Angeles for the construction of the Golden State Freeway; and had its genesis in a deed dated January 5, 1897 (Ex. F) executed by G. J. Griffith, defendant's father, conveying to the city without condition or restriction cer-

tain lands which, by city ordinance, were dedicated as a public park and today constitute the major portion of Griffith Park.

On March 5, 1898, Griffith executed another deed (Ex. G) reciting a conveyance to the city of lands which include those already conveyed by the deed of 1897 (Ex. F). The conveyance was "upon condition" that the lands be used exclusively as a public park, and "upon further condition" that the name Griffith be retained by the city; and whenever any part of the land shall cease to be used as a park and if the name ever be changed by the city, it shall immediately, upon the happening of either event, revert to the grantors or their heirs.

In March of 1954, the State of California notified the Los Angeles Board of Recreation and Park Commissioners of its intention to appropriate a portion of Griffith Park lands for a state highway, which the board protested, submitting alternate routes outside the park; however, on March 13, 1955, the State Highway Commission passed a resolution (Ex. 10) declaring that the public interests and necessity require the acquisition of these lands for state freeway purposes; and pursuant thereto, the state commenced the within action on April 27, 1955. Orders of immediate possession were issued; the state took physical possession; and before the trial the Golden State Feeway was completed, utilizing approximately 200 acres of park property, which the board replaced with other purchased lands. Defendant Griffith's answer to the complaint alleged, among other things, the taking to be contrary to the terms of the grant and city charter; but as-

serted no reversionary right and sought no damages for its taking.

Appellant's assignments of error are lengthy, consisting of 22 separate points, only some of which are supported by argument, citation of authority, or reference to the record (Rules on Appeal, rule 15(a)). We ascertain, however, that his primary attack lies against various findings and procedural errors of the trial court; and that his main complaint goes to the right of the state to acquire park property for state highway purposes, and his right as the reversionary heir to compensation for the taking.

Appellant first contends that the state cannot acquire property already dedicated by a municipality as a park. A review of the statutory authority relating to the right of eminent domain for state highway purposes and the instruments controlling the grant convinces us that the taking was proper.

Although section 1240, Code of Civil Procedure, permits the state under its general authority to condemn through the Department of Public Works for state highway purposes any land which it is authorized to acquire (Streets & Hy. Code, §102), to take "property appropriated to public use . . . for a more necessary public use than that to which it has already been appropriated" (subd. 3), a separate statute specifically authorizes the taking of park lands. Section 103.5, Streets and Highways Code, provides that the Department of Public Works may acquire any property dedicated to park purposes, however it may have been dedicated, when the State Highway Commission has determined by resolution that "such property is neces-

sary for state highway purposes." Reading the three statutes together, it is clear that lands heretofore dedicated as a public park, are as well included in the general section authorizing the state to acquire property already appropriated to a public use if the acquisition be for "a more necessary public use" (Code Civ. Proc., §1240, subd. 3), as in the special statute which authorizes a state to take park property when the commission determines it is necessary for state highway purposes. The latter statute, specific in its reference to lands already dedicated to park purposes, controls the former general provision even though it, "standing alone, would be broad enough to include the subject to which the more particular provision relates." (Rose v. State, 19 Cal. 2d 713, 724 [123 P. 2d 505].)

In that connection, for the moment disregarding the controlling section (103.5), the state did properly acquire the land for "a more necessary public use" under section 1240, subdivision 3, Code of Civil Procedure. Inasmuch as the taking for highways has from time immemorial been universally recognized as one for public use (Rindge Co. v. County of Los Angeles, 262 U. S. 700 [43 S. Ct. 689, 67 L. Ed. 1186]; People v. Olsen, 109 Cal. App. 523 [293 P. 645]; County of San Mateo v. Coburn, 130 Cal. 631 [63 P. 78, 621]), streets and highways are of great public concern (Sherman v. Buick, 32 Cal. 241 [91 Am. Dec. 577]), the control, construction and maintenance of which are governmental functions (Bettencourt v. State, 123 Cal. App. 2d 60 [266 P. 2d 201, 43 A. L. R. 2d 545]); and the establishment of a statewide system of freeways and connections thereto is "essential to the future development of the State of California" (Sts. & Hy.

Code, §250 *et seq.*, as amended in 1959); it cannot be said as a matter of law that a state freeway is not a "more necessary public use" than a city park—particularly when, as here, the freeway also constitutes a federal defense highway (Ex. 13), of concern to city, county, state and nation, primary to a park dedicated and maintained for the use of city residents.

Appellant argues that under subdivision 2, section 1240, Code of Civil Procedure, "land belonging to any incorporated city which has been appropriated to some public use may not be taken under the eminent domain provision" (A. O. B., p. 5). Section 1240 does not relate to what property "may not be taken," but specifically declares what "may be taken under this title (Title VII)" (County of Marin v. Superior Court,[1] 53 Cal. 2d —— [2 Cal. Rptr. 758, 249 P. 2d 526]), which includes, under subdivision 2, lands belonging "to any county, incorporated City . . . not appropriated to some public use . . ." The converse interpretation urged by appellant and his reliance on dicta in Marin County Water Co. v. County of Marin, 145 Cal. 586 [79 P. 282], are unwarranted inasmuch as subdivision 2 is silent concerning lands owned by an incorporated city and appropriated to a public use, subdivision 3, immediately following, specifically includes property already appropriated to public use, and Marin County Water Co. v. County of Marin, *supra*, 145 Cal. 586, is not here applicable.

Citing section 13, article XI, California Constitution, prohibiting the Legislature from delegating to "any special commission . . . any power to make, control,

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[1]Advance Report Citation: 53 A. C. 638.

appropriate, supervise or in any way interfere with any county, city, town or municipal improvement, money, property or effects . . . or perform any municipal functions whatever," appellant argues the unconstitutionality of section 103.5, in that the State Highway Commission, "a special commission," has no authority, by resolution or otherwise, to determine that city park property is necessary for state highway purposes.

The obvious purpose of this provision was to "prevent the state Legislature from interfering with local governments by the appointment of its own special commissions for the control of purely local matters" (In re Pfahler, 150 Cal. 71, 87 [88 P. 270, 11 Ann. Cas. 911, 11 L. R. A. N. S. 1092]) and "to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature." (People v. Hoge, 55 Cal. 612, 618.) Sections 100.1, 100.2, and 100.3, Streets and Highways Code, authorize the State Highway Commission to designate, construct and maintain freeways on "such terms and conditions as in its opinion will best subserve the public interest," and "to do anything else necessary to the maintenance of a state highway system" (Holloway v. Purcell, 35 Cal. 2d 220, 231 [217 P. 2d 665]); and it may, in accord with the needs of public interest, condemn municipal property. The power to establish and maintain a state highway system by the designation of freeways under the "policy of freeway construction in the public interest" adopted by the state Legislature, has been properly and validly delegated by it to the State Highway Commission (Holloway v. Purcell, *supra*, 35 Cal. 2d 220, 231-232); and the purpose for which it was formed takes it out of that category of

"special commissions" mentioned in the constitutional prohibition. The commission fulfills a statewide purpose, not a local one; and its authority and functions are not *per se* an interference with municipal affairs even though, in properly exercising the state's inherent power of eminent domain the maintenance of a civic improvement or a municipal function may be impaired.

Appellant complains that the taking violates the city charter providing that all lands dedicated as a public park shall forever remain to the use of the public inviolate (§170(b)(3)e); and that the latter "being a Legislative act" having been approved by the Legislature subsequent to the enactment of section 103.5 (In re Means, 31 Cal. App. 2d 290 [87 P. 2d 894]), controls under the rule of construction of two conflicting legislative acts. A similar issue was raised in Wilkes v. City & County of San Francisco, 44 Cal. App. 2d 393 [112 P. 2d 759], in a personal injury action arising out of negligence in the maintenance of a highway, in which plaintiff filed her claim under the provisions of a city charter which she claimed prevailed over the State Public Liabilities Act. Said the court in holding against her: "The approval of a municipal charter by the state Legislature confers the power of home rule upon the municipality, but this power is limited to municipal affairs. In non-municipal matters the general rule controls." (P. 393.). "It is universally recognized that the state in its sovereign capacity has the original right to control all public streets and highways" (Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 118 [116 P. 557]); the designations and construction of the state highway system are "of more than local concern" (Young v. Superior Court,

216 Cal. 512, 517 [15 P. 2d 163]), are matters of statewide concern (Cal. Const., Art. IX, §36; Sherman v. Buick, 32 Cal. 241 [91 Am. Dec. 577]); and it is essential "to the future development of the State of California to establish and construct a statewide system of freeways" (Sts. & Hy. Code, §250). Section 103.5, specifically authorizing the exercise of the power of eminent domain over park lands for state highway purposes, clearly "relates to a matter of statewide concern," which controls over the city charter; "and does so without regard to whether its enactment preceded or followed the charter provision" (Wilkes v. City & County of San Francisco, *supra*, 395), even though the taking affects a municipal function "in the accomplishment of a proper objective of statewide concern." (Department of Water & Power v. Inyo Chemical Co., 16 Cal. 2d 744, 754 [108 P. 2d 410].)

Related closely to this issue is appellant's claim that the trial court erred in denying leave to file a cross-complaint, and excluding evidence on the issue of bad faith and abuse of discretion.

Three years and five months after filing his answer, appellant moved for leave to file a cross-complaint against plaintiff and the city, alleging a reversionary right and damages for its taking, the state's violation of the charter, and state and federal constitution, the unconstitutionality of section 103.5, the abuse of discretion and arbitrary acts of the Department of Public Works, the availability of better alternative routes, a conspiracy of the city and state to divert park lands, and the city's lack of good faith in defending against the state's taking. The motion was denied. All of these matters with the exception of those relating to abuse

of discretion, availability of alternate routes, conspiracy and bad faith, were covered by issues raised by the answer, heard and considered by the trial judge and are now before this court; it is only those excepted we propose to here discuss.

A defendant has the right to file a cross-complaint at the time of filing his answer (Code Civ. Proc., §442), but thereafter leave to file such a pleading becomes a matter of discretion for the trial court (Nels E. Nelson, Inc. v. Tarman, 163 Cal. App. 2d 714 [329 P. 2d 953]). In addition to the questions of law involved, it no doubt considered the delay, the pretrial proceedings, the explanation for the delay, and information disclosing that the facts relied upon by defendant existed as well on August 17, 1956, when the answer was filed; and in reviewing the same we find neither abuse of discretion nor error of law in the denial.

Relative to whether a finding of necessity of a condemning body is reviewable when facts establishing fraud, bad faith, abuse of discretion or conspiracy are affirmatively pleaded, it is now settled that recitation of "public necessity" in a resolution is conclusive evidence thereof, and "questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity" (People v. Chevalier, 52 Cal. 2d 299, p. 307 [340 P. 2d 598]). In the Chevalier case the

court upheld the lower court's ruling striking the "special defenses" relating to the issue of "necessity," which included fraud, bad faith, abuse of discretion and conspiracy between the city and state; and disapproved any language to the contrary in various cases, specifying among them People v. Milton, 35 Cal. App. 2d 549 [96 P. 2d 159], relied upon by appellant.

Inasmuch as the determination of necessity for the taking for highway purposes is, under the circumstances alleged in appellant's cross-complaint, conclusive under section 103.5, and bad faith and abuse of discretion, conspiracy and bad motive of the condemning body are not justiciable issues, neither was it error for the trial court to exclude evidence on these matters. People v. Chevalier, *supra*, is also controlling on the inadmissibility of evidence of alternate routes and we find on the issue of "necessity" no error in excluding the same or evidence of cost of acquisition of other land to substitute for the park land taken.

Appellant also assigns as error the trial court's denial of his objections to the pretrial conference. Aside from the bare statement of this assignment, he has failed to assume the burden of proving wherein the error lies, offering neither argument nor authority. Before dismissing the point it should be noted that the record is silent that the objections were urged, argued or even considered on their merits. Indeed there is nothing to show their denial by minute order or otherwise, other than that the conference was held, from which it would be reasonable to infer either that the objections were never urged or if they were that the court made no determination thereof.

Although appellant urges "(T)he taking of Riverside Drive within Griffith Park" to be error, he does not show the materiality of the status of the Drive—as a state highway or as a park roadway. Even assuming that it was still park land, the state, under the authority hereinabove set forth, had as much right to take the same as any other portion of the park. If his contention goes to the amount of compensation, the record shows that the value of the easements acquired by the state was the subject of a stipulation between the city and the state, no evidence thereof was offered by appellant and, in any event, as hereinafter developed, the construction of the grant and the law covering the same do not admit any interest of appellant in the land, in reversion or in the award.

The last general issue raised by the remaining assignments of error attacking certain trial court findings that there was no reversion of the lands to appellant and he is not entitled to any part of the award, relates to the construction of the instruments of the grant. He says, in support of his reversionary right to the land in fee that the 1896 city ordinance accepting and dedicating the 3,000 acres as a park and the 1897 deed conveying the same to the city were merged into the deed of 1898, which conveyed a determinable base fee and controls the entire grant; and argues that the construction of the state highway in the park, and the city's execution of the "Freeway Agreement," its abandonment of certain pleaded defenses in its answer and its acquiescence in the diversion of the property, caused reversion of the land to him. We find no merit to either position.

On December 16, 1896, the city by ordinance accepted and dedicated, as a public park, 3,000 acres of land given by Griffith "without condition or restriction." A deed dated January 5, 1897, executed by him conveyed these lands to the city in fee simple without condition. There is nothing in the record before us to indicate that this deed was not duly executed or for any reason did not constitute a conveyance. The state of the evidence leaves us with only one conclusion—that the 1897 deed conveying the 3,000 acres described therein, was the "final and exclusive memorial of the intention and rights of the parties." (Wing v. Forest Lawn Cemetery Assn., 15 Cal. 2d 472, 479 [101 P. 2d 1099, 130 A. L. R. 120].) Thus, upon its execution Griffith (the grantor) completely and forever divested himself of any legal right, interest or title in the land covered by the deed; and no act done subsequent to the execution and delivery of the deed can affect its integrity. (Lavely v. Nonemaker, 212 Cal. 380, 383 [298 P. 976].) The next year, on May 5, 1898, Griffith executed another deed conveying to the city 3,015.788 acres of land, including, but not limited to the lands previously conveyed without condition or restriction by the 1897 deed. The 1898 deed, although covering the same lands, in no way legally affected the prior instrument or the status of the land conveyed thereunder and could and did convey to the city only those lands described therein which were not included in the earlier deed. The deed of 1897 conveying the land in fee simple without condition or restriction controls that grant and appellant thereunder has no right, title or interest to those lands reversionary or otherwise. The cases relied upon by appellant do not support his claim that the 1898 instrument "merged all previous agreements, superseding the 1897 deed," for

they do not deal as here with the effect of a subsequent deed on an earlier one, but with the effect of a subsequent deed on a previous contract to purchase pursuant to which the deed was given.

Turning now to the construction of the 1898 deed to determine the status of that limited acreage not included in the earlier 1897 conveyance, the language employed therein entirely disclaims a determinable fee which, when terminated, caused an automatic reverter; but on the contrary, makes it clear that the city became the owner thereof in fee simple subject to a condition subsequent, the breach of which requires reentry to terminate the estate. The 1898 instrument provides that the lands are "(T)o be used as a public park. . . . And this gift and grant is made, and said property is hereby conveyed upon the further condition that the name of said park now established by ordinance of said city, to wit, 'Griffith Park' to be continued as the official name and designation of said park, and whenever said tract of land hereby conveyed, or any part thereof shall cease to be used as a park . . . and if said city . . . shall at any time change the official name of said park . . . then the lands hereby conveyed shall immediately upon the happening of either of said events, revert to said parties of the first part or their heirs" (Ex. G).

The words "upon condition" are common to, and manifest the intent to create an estate in fee simple subject to a condition subsequent (Rest., Property, §45, p. 140), the effect of which is to convey the entire estate; but upon the occurrence of the condition imposed, to give the holder of the reversionary interest the right to reenter and declare the termination of the estate—if no reentry is made the estate continues. A similar descrip-

tion is found in a deed conveying lands to the city of Long Beach "upon the condition" they be used exclusively as and for a public park and "upon the further condition" that no buildings or structures be erected on the premises that would obstruct the view of the Pacific Ocean from lots north of and opposite the property (Taylor v. Continental Southern Corp., 131 Cal. App. 2d 267 [280 P. 2d 514]). Holding the instrument to be a conveyance upon a condition subsequent, the court stated at page 274: ". . . the mere possibility of forfeiture of title for breach of condition subsequent could not affect that vested interest, not unless or until the owner of the reversionary right has invoked the condition by reentering or suing in some form for declaration of termination of the grantee's title"; and relative to the right of reentry: ". . . when the grantor conveys the fee simple on condition subsequent, he has no actual *estate* remaining with him. The grantee takes the entire estate of the grantor, and unless he breaches the condition is in the same position as an owner in fee simple absolute. The interest of the grantor in such case is not, strictly speaking, a residue of the estate left in him; it is merely a right or power to terminate the estate of the grantee and retake the same, if there is a breach of condition (Citations)." (P. 275.) A deed providing that the conveyance is made for railroad purposes only, and "if not so used, then it is to revert to the parties of the first part" was construed as creating condition subsequent (Behlow v. Southern Pac. R.R. Co., 130 Cal. 16 [62 P. 295]); likewise one conveying land for use as a dam and reservoir providing "that in case" the grantee "shall cease to use the said premises for the said purposes . . . then and in that case" they "shall revert to and become the property of" the

grantor. (Johnston v. City of Los Angeles, 176 Cal. 479 [168 P. 1047].) In City of Santa Monica v. Jones, 104 Cal. App. 2d 463 [232 P. 2d 55], several deeds conveyed a fee simple title to land "upon the condition . . . that the property conveyed should 'revert' to the grantors," upon several contingencies. Holding the conveyance to be a fee simple subject to a condition subsequent, the court at page 473 said: ". . . the breach is not regarded as a breach until the grantor or his heirs elect to give it the requisite vitality by declaring a forfeiture based thereon by the process of reentry or its legal equivalent."

So, too, the rule of strict construction applicable to a condition subsequent provision (Behlow v. Southern Pac. R. R. Co., 130 Cal. 16, 19 [62 P. 295]) requires the court to avoid forfeiture in a deed whenever possible (Mitchell v. Cheney Slough Irrigation Co., 57 Cal. App. 2d 138 [134 P. 2d 34]; Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745 [64 P. 2d 762]; Hasman v. Elk Grove Union High School, 76 Cal. App. 629 [245 P. 464]; Civ. Code, §1443) and an interpretation requiring reentry before forfeiture over an interpretation creating a determinable fee providing for automatic forfeiture. Similarly applicable, under the instant circumstances, is the rule of construction that "a grant is to be interpreted in favor of the grantee" (Civ. Code, §1069; Hasman v. Elk Grove Union High School, 76 Cal. App. 629 [245 P. 464]; Ball v. Mann, 88 Cal. App. 2d 695 [199 P. 2d 706]; Anderson v. Broadwell, 119 Cal. App. 130 [6 P. 2d 260]; Cooper v. Selig, 48 Cal. App. 228 [191 P. 983]). Even assuming, as urged by appellant, that there was a breach of the condition subsequent by the city we find nothing in the evidence to justify any finding that a forfeiture of the

estate was declared by the process of "reentry or its legal equivalent."

The trial court found that no acts of the state were in violation of the conditions of the grant, and the condemnation did not cause a reversion of all or any part of the fee to appellant. In so finding it no doubt also considered the following provision in the 1898 deed: "It is understood that the use of any part of said premises for . . . transportation purposes, for carrying the inhabitants of said City into and through said park, shall not be considered a violation of any of the conditions upon which this donation and grant are made, anything to the contrary thereto notwithstanding." (Ex. G.) Although it is true that the taking was for a state use and that the same ultimately became a part of a statewide freeway project, it cannot be denied that the highway in question has made Griffith Park more readily accessible to all residents of the city; and as a freeway which can be, and is, employed for carrying the inhabitants of the city "into and through said park" the use appears to be one excepted under the deed.

However, proceeding to an interpretation of the condition subsequent, we note that the State of California was at no time ever a party to any of the instruments. No deed provision, especially between two strangers, could legally curtail or prohibit the otherwise lawful exercise of the state's power of eminent domain. Any interpretation of the condition subsequent sought by appellant would not only limit and seriously impair the state's power which, although not arising out of specific grant in the Constitution, is inherent in the state and found upon the law of necessity (Rose v. Superior Court, 19 Cal. 2d 713 [123 P. 2d 505]; but would be

contrary to section 103.5, expressly providing for the state's acquisition of property dedicated to park purposes; and would be precluded under section 1441, Civil Code, which provides that a condition in a contract, the fulfillment of which is unlawful, is void, and cannot affect the grant under the deed (Wills v. Los Angeles, 209 Cal. 448, 451 [287 P. 962, 69 A. L. R. 1044]). Similarly the city of Los Angeles is "not responsible for the exercise" by the state of its power of eminent domain and has no control over the same, and the provision in the deed between the city and a third party, if construed to affect a prohibition of that power, would be wholly ineffective (City of San Gabriel v. Pacific Elec. Ry. Co., 129 Cal. App. 460, 466 [18 P. 2d 996]). "All property is, and must be, held subject to the right of the State to take and use it for public purposes; this includes property devoted to a public use . . ." (Town of Winchester v. Cox, 129 Conn. 106 [26 A. 2d 592, 596]).

The universally recognized rule that the power of eminent domain is paramount to the right secured by the obligation of contract clause, and its exercise in no way interferes with the inviolability of contracts (Pennsylvania Hospital v. Philadelphia, 245 U. S. 20 [38 S. Ct. 35, 62 L. Ed. 124]; Cincinnati v. Louisville & N. R. Co. 223 U. S. 390 [32 S. Ct. 267, 56 L. Ed. 481]; 12 Am. Jur. 22, §394), precludes any holding that the resolutions of the commission are unconstitutional is impairing the obligations of the contract between the donors of Griffith Park and the city of Los Angeles. The constitutional inhibition of any state law impairing the obligation of contracts is not a limit on any statute authorizing the state or any department thereof to exercise the power of eminent domain.

On the point raised by appellant that the city, having permitted "the street to be closed" and consented to the taking by executing an agreement with the state, abandoned the use of the lands for park purposes, which thereupon immediately reverted to him—the record is silent relative to any streets within Griffith Park which were agreed to be closed. However, the city did execute a freeway agreement with the state, but it expressly provided that "(T)he city's execution of this agreement in no way implies that the city consents to, or approves of, the State's acquisition of any city-owned lands for freeway purposes. . . ." (Par. 7.) We know of no requirement that the city refuse to cooperate with the state once it has been established to the city's satisfaction that the state has the power to condemn—indeed, an arbitrary refusal to do so might prove to be unjustifiably costly to the taxpayers. Such cooperation is, in fact, not only contemplated by, but expressly authorized under, section 100.2, Streets and Highways Code.

To his claim that the city abandoned the defenses set forth in its answer—that the transfer of land from park use will violate certain charter provisions—appellant has failed to offer any argument or authorities.

We hold that appellant has no interest of any kind in the fee estate which might justify his participation in the award; thus, the only right he could claim as reversionary heir would be that arising out of a showing that the limited lands conveyed under the 1898 deed

would, within a reasonable time had there been no condemnation, have vested in him for the city's violation of the condition subsequent (City of Santa Monica v. Jones, 104 Cal. App. 2d 463 [232 P. 2d 55]). Although it is true that when a reversionary interest is condemned the reversioner must be compensated, it appears from the record that appellant's only claim was for the value of the entire fee; he sought no reversionary right or compensation therefor. Further, any reversionary interest terminated upon the state's taking and was then so remote, speculative and contingent as to justify no consideration by the court, and even had it a value capable of estimate, appellant offered no proof thereof.

It is well settled that the valuation in an eminent domain proceeding is based solely upon market value (People v. Vinson, 99 Cal. App. 2d 100 [221 P. 2d 161]; People v. Ricciardi, 23 Cal. 2d 390 [144 P. 2d 799]); therefore, unless the claimed reversionary right has some pecuniary value, no compensation is allowed for its taking. If "at the time fixed for the valuation the reversion has not occurred, the reversionary interest is said not to have any compensable value in a condemnation proceeding." (Romero v. Department of Public Works, 17 Cal. 2d 189, 195 [109 P. 2d 662].) So, too, "(I)t is well settled that upon condemnation of property held by a grantee under a deed containing a condition subsequent providing for a reverter to the grantor or his heirs upon termination of the use provided in the condition, the rights of reverter of the

grantor and his heirs are terminated and the award for the property belongs to the grantee (Citations)" (City of Santa Monica v. Jones, 104 Cal. App. 2d 463, at p. 475 [232 P. 2d 55], quoting from Carter v. New York Central Railroad Co., 73 N. Y. 2d 610). And in discussing a situation similar to the one at bar, the court stated at page 472: "To us it seems altogether probable that appellants filed their answer upon the assumption that as the property taken by the city could not in the future be used for railway purposes by the company, for that reason alone it would revert and hence that appellants were entitled to the award. Any such view is directly contrary to well-established principles of law."

Any reversionary right appellant may have had under the 1898 deed was extinguished at the time the state condemned the interest of the city, for the seizure was of the entire title by the single act of appropriation. At that moment there had been no disuse and the estate being enjoyed by the city might otherwise have continued forever. The right of appellant was remote, speculative and a mere possibility of no value capable of estimate. (City of San Gabriel v. Pacific Electric Ry. Co., 129 Cal. App. 460 [18 P. 2d 996].) Of interest is First Reformed Dutch Church v. Croswell, 210 App. Div. 294 [206 N. Y. Supp. 132], cited in City of Santa Monica v. Jones, 104 Cal. App. 2d 463 [232 P. 2d 55], in which the court held, even under a deed containing a limitaton, that the seizure was of the entire title and

at the moment of appropriation there had been no disuser, as a result of which the rights of the heirs in reversion were a mere possibility, possessed of no value capable of estimate.

The record is silent relative to the value of appellant's reversionary right—indeed, under the cases just cited it would appear that valuation would be very nearly impossible to estimate. Appellant not only made no claim to a reversionary right, separate and apart from that of the land in fee and sought no award for its taking, but he offered no proof thereon. The court did not err in finding that all that was of value was the estate of the city for which it was entitled to compensation, and that appellant was entitled to no part thereof.

The judgment is affirmed.

Wood, *P. J.*, and Fourt, *J.*, concurred.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation; *et al.*,

Appellees.

MOTION TO DISMISS.

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IN THE

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PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

MOTION TO DISMISS.

The appellee, City of Los Angeles, a municipal corporation, hereby moves to dismiss the appeal heretofore filed with this Honorable Court by Van M. Griffith. Such motion is based upon the following grounds:

1. The judgment appealed from rests upon an adequate non-federal basis.

2. The federal questions sought to be reviewed were not expressly passed upon.

3. The appeal does not present a substantial federal question.

The Statement of Jurisdiction filed by the appellant herein contains several misleading statements and omis-

sions which it is necessary to point out and correct before we can properly discuss and elaborate upon each of our above-mentioned grounds in support of our Motion to Dismiss.

Statement of Facts.

The following statement of facts is based upon the factual statement of the California District Court of Appeal set forth in its opinion (which must be accepted as true since appellant herein never filed a petition for rehearing before that court under Rule 28(b) of the Rules on Appeal adopted by the Judicial Council of the State of California requesting a correction of the record before filing his petition for hearing in the California Supreme Court).

In 1897 appellant's father deeded to the City of Los Angeles in fee simple and without condition 3000 acres of land which the City of Los Angeles dedicated to park purposes. In 1898 appellant's father deeded to the City of Los Angeles some 3015.788 acres of land, including the 3000 acres deeded the previous year, which later deed contained the provision:

> ". . . this gift and grant is made, and said property is hereby conveyed upon condition that said land shall be used and maintained by said City of Los Angeles and its successors in interest and estate, exclusively as a public park and pleasure ground, for the amusement, recreation, health and pleasure of its inhabitants," and upon the further condition that the name of said park . . . be continued as the official name and designation of said park; and whenever said tract of land hereby conveyed, or any part thereof shall cease to be used as a park, and for pleasure, amusement, recreation, health, and

uses incident to the aforesaid uses according to the intents and meanings of the same, and if said City or its successors in interest or estate shall at any time change the official name of said park from Griffith Park to some other name or designation, then the lands hereby conveyed shall immediately upon the happening of either of said events, revert to said parties of the first part or to their heirs. It is understood that the use of any part of said premises . . . for railroad or other transportation purposes for carrying the inhabitants of said City into and through said park, shall not be considered a violation of any of the conditions upon which this donation and grant are made, anything herein to the contrary thereto notwithstanding. . ."

These lands, together with others subsequently acquired by the City of Los Angeles, were and are known as Griffith Park.

In 1955 the California State Highway Commission by resolution authorized, and the State of California commenced, a proceeding to condemn the interests of the City of Los Angeles and of appellant Van M. Griffith and others in approximately 200 acres of said park lands to make way for the construction of a state freeway therein.

The City of Los Angeles answered and denied the state's right to condemn such land, but stipulated with the state that the value thereof was $3,750,000. Appellant Griffith's answer to the complaint consisted primarily of the contention that the state could not condemn such land because: 1) contrary to the terms of the 1898 deed, and 2) contrary to the City Charter, but claimed no right to reversion or compensation for the

taking of his claimed interest therein. Some 3½ years after he had filed his answer, and shortly before the actual trial of the matter, Griffith sought leave to file a cross-complaint, which leave was denied.

Thereafter the trial court determined that the use of Griffith Park lands for the construction of a freeway was not prohibited by the terms of the 1898 deed; that the condemnation of such lands was permissible; that no part of Griffith Park reverted to appellant and that he had no compensable interest therein. The above rulings were affirmed in the California District Court of Appeal and appellant's Petition for Hearing in the California Supreme Court was denied.

In the light of the foregoing it is submitted that appellant's factual references in his Statement of Jurisdiction are in error or incomplete in the following material respects:

1. Appellant omits any reference (other than by quoting from the opinion of the District Court of Appeal) to the fact that his father had conveyed a substantial portion of the Griffith Park lands to the City of Los Angeles in 1897 in fee simple and without condition, and that it is only the *additional* lands conveyed by the 1898 deed which were subject to the provisions of that later deed.

2. Appellant omits any reference to what, if any, of the additional lands conveyed by the 1898 deed were condemned.

3. Appellant has only partially set forth the conditions to the 1898 deed (Statement of Jurisdiction, page 3) and has failed to mention the substance or set forth the *whole* thereof as we have quoted above.

4. Appellant in framing his question No. 1 (Statement of Jurisdiction, page 3) incorrectly refers to the state freeway as being "inconsistent" with the dedication of the subject land for park purposes under the 1898 deed. He avoids mentioning the explicit provision of the 1898 deed, hereinabove quoted, that "the use of any part of said premises for . . . transportation purposes, for carrying inhabitants of said City into and through said park, shall not be considered a violation of any of the conditions upon which this donation and grant are made", and further avoids mentioning the trial court and District Court of Appeal rulings in interpreting such phrase that the use of the subject land for freeway purposes *is* consistent with the terms of the 1898 deed. (Statement of Jurisdiction, Appendix, page 16.)

I.

The Judgment Appealed From Rests Upon an Adequate Non-Federal Basis.

As we understand the rather lengthy federal questions urged by appellant as a basis for this appeal (Statement of Jurisdiction, pp. 3 to 6), they are essentially as follows:

1. That by reason of (a) Griffith Park having reverted to him, and (b) no compensation having been paid for the taking of Riverside Drive within Griffith Park, the condemnation of a portion of Griffith Park by the State of California for its "inconsistent" use as a state freeway without appellant's being compensated therefore is in violation of the 14th Amendment to the United States Constitution.

2. That by reason of (a) his being denied leave to file a cross-complaint, (b) the taking of Griffith Park lands in violation of the 1898 deed, and

(c) his reversionary interest having been taken without compensation, he has been denied due process of law under the 14th Amendment to the United States Constitution.

3. That by reason of the passage of (a) Section 103.5 of the California Streets and Highways Code, (b) a resolution of the State Highway Commission, and (c) an ordinance of the City of Los Angeles, and a resolution of the Board of Recreation and Park Commissioners of such City, the obligation of the 1898 deed has been impaired (presumably in violation of Article 1, Section 10 of the United States Constitution).

A careful reading of the above federal questions posed by appellant shows that his claim of the denial to him of certain federal constitutional rights is based upon his misstatement of the answers to certain basic non-federal questions. As was stated in *Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051, a federal question resting on false assumptions is without merit and affords no basis for review by the United States Supreme Court. We submit that the opinion of the District Court of Appeal on certain non-federal questions renders unnecessary a specific determination upon the federal questions urged by appellant and provides an adequate non-federal basis upon which the judgment of the District Court of Appeal may be sustained. Such determinative non-federal rulings of the District Court of Appeal are as follows:

1. The taking of lands and the construction of a freeway in Griffith Park by the State of Cali-

fornia is consistent with and not prohibited by the terms of the 1898 deed of certain of the Griffith Park lands to the City of Los Angeles and did not cause a reversion thereof to appellant (Statement of Jurisdiction, Appendix, p. 16).

2. In any event, the 1898 deed conveyed a fee simple subject to a condition subsequent which required a reentry in order to terminate the estate granted if the conditions were breached (Statement of Jurisdiction, Appendix, page 13), and even assuming that the state's condemnation of a portion of Griffith Park and its construction of a freeway thereon constituted such a breach, appellant never exercised his right of reentry (Statement of Jurisdiction, Appendix, pp. 15 and 16), and thus the City's fee simple estate continued (Statement of Jurisdiction, Appendix, p. 13) and such park lands did not revert to appellant.

3. Riverside Drive constituted a portion of the freeway easements taken by the State of California for which compensation was paid to the City of Los Angeles (Statement of Jurisdiction, Appendix, p. 11).

4. The granting or denial to appellant by the trial court of leave to file a cross-complaint after his filing of an answer to the complaint is a matter of discretion with the trial court and no showing of abuse of discretion by the trial court's denying such leave was shown by appellant under the facts of this

case (Statement of Jurisdiction, Appendix, pp. 8 and 9).

5. It was impossible in any event to award appellant any compensation for the taking of his reversionary interest because he offered no proof as to the value thereof, if any, nor did he ever claim other than the value of the entire fee (Statement of Jurisdiction, Appendix, pp. 19 and 21).

6. The California Code of Civil Procedure, Section 1240(3) (the validity of which is not attacked by appellant herein) authorized the state to acquire the questioned freeway easement in the instant case (Statement of Jurisdiction, Appendix, p. 4).

The law is clear that the United States Supreme Court will not take jurisdiction of a matter where the judgment of the state court could be supported upon an adequate non-federal ground. (*Stembridge v. State of Georgia*, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Buck v. People of the State of California*, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775; *Zorach v. Clauson*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954; *Hammerstein v. Superior Court of California*, 340 U. S. 622, 71 S. Ct. 521, 95 L. Ed. 586). It is submitted that adequate non-federal grounds exist in the instant case to support the judgment of the District Court of Appeal of the State of California and that this Honorable Court should therefore refuse jurisdiction of this appeal.

II.

The Federal Questions Sought to Be Reviewed Were Not Expressly Passed Upon by the State Courts.

Although appellant suggests that he has urged and the California trial and appellate courts have determined federal questions throughout the proceedings (Statement of Jurisdiction, pp. 7-9), actually appellant urged such contentions only at pages 38-40 of his Opening Brief in the District Court of Appeal. Further, such contentions were never expressly passed upon by any California court as federal questions.

Appellant claims; at page 7 of his Statement of Jurisdiction, that the federal question of impairment of the obligation of a contract was raised in paragraphs VIII, IX and XI of his answer to the complaint. A reading of those paragraphs reveals that his only claim therein was that the construction of the subject freeway would violate the terms of the 1898 deed and would violate the provisions of the City Charter. He nowhere alleged any act or statute as being violative of the United States Constitution, nor does he now set forth in what manner the trial court ruled upon such alleged federal constitutional issue.

Appellant next refers to the *content* of his proposed cross-complaint as having raised a federal question. (Statement of Jurisdiction, pp. 7 and 8.) That cross-complaint was *never filed*. (Statement of Jurisdiction, p. 12). Appellant merely sought leave to file same, which leave the trial court denied in the exercise of its undis-

puted discretion. Appellant makes no contention that the action of the trial judge was based upon any ruling under the federal constitution.

Appellant next cites as federal questions his objections presented in the pretrial conference and in the trial court that he had been "denied his day in court" by the denial of his request for leave to file a cross-complaint (Statement of Jurisdiction, p. 8). We have read appellant's "Objection . . . to Pre Trial Conference" and all the pages of the Reporter's Transcript cited by him and are unable to find wherein he claims his rights under the federal constitution have been denied nor have we been able to find where the trial court's rulings on such objections were based upon federal constitutional law. Moreover, discretionary action of a state court denying leave to file a particular document, which action is reviewed and affirmed by a state appellate court, is solely a state affair and does not present a federal question (*Barrington v. Missouri*, 205 U. S. 483, 27 S. Ct. 582, 51 L. Ed. 890).

Appellant's reference to the trial court's Findings of Fact (Statement of Jurisdiction, p. 8) as having ruled upon a federal constitutional point is equally unavailing. A search of the record reveals that the federal constitution was not even referred to therein by the trial court.

Where a party claims that a federal question was properly raised in the state courts, he must show that such question arose from "distinct and positive" averments and not from mere inference. "The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or author-

ity, of the United States." (*Michigan Sugar Co. v. Michigan*, 185 U. S. 112, 22 S. Ct. 581, 46 L. Ed. 829). To the same effect see also *House v. Road Improvement District No. 2*, 266 U. S. 175, 45 S. Ct. 60, 69 L. Ed. 229; *Valley Steamship Co. v. Wattawa*, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084; *Thomas v. Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782. Further, a claim that a federal question has been judicially passed upon must similarly be supported by unequivocally clear language. (*Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191).

At page 9 of his Statement of Jurisdiction appellant refers [redacted] the first point at which we can agree that he raises a federal question—his Opening Brief in the California District Court of Appeal wherein, at pages 38 to 40, he urged as violative of *both* the state and federal constitutions, that:

> 1. The taking of Griffith Park lands without compensation to him is in violation of the 14th Amendment to the United States Constitution.
>
> 2. The taking of Griffith Park lands for state freeway purposes violates the due process clause of the 14th Amendment to the United States Constitution.
>
> 3. The enactment of Section 103.5 of the Streets and Highways Code and the adoption by the State Highway Commission of a resolution authorizing the condemnation of Griffith Park lands for a state freeway impairs the obligation of a contract in violation of Article 1, Section 10 of the United States Constitution.

The District Court of Appeal in answering such contentions stated only that the exercise of the power of

eminent domain did not interfere with the inviolability of contracts, cited two federal cases in support thereof, and then concluded (Statement of Jurisdiction, Appendix, p. 17) that the resolutions of the California State Highway Commission authorizing the condemnation of Griffith Park lands could not be "unconstitutional as impairing the obligations of the contract between the donors of Griffith Park and the City of Los Angeles," and that "the constitutional inhibition of any state law impairing the obligation of contracts is not a limit on any statute authorizing the state or any department thereof to exercise the power of eminent domain." In neither instance, however, did the District Court of Appeal mention whether it was making such comment with respect to the federal or the California Constitution or both.

In the case of *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191, relator sought relief in the state courts, urging both state and federal constitutional grounds. The state court denied such relief, citing federal cases under the federal constitution, but did not specify that it was basing its opinion on the federal constitution. The United States Supreme Court in denying certiorari recognized that the state court opinion *may* have been based upon the state constitution and determined that when if was not evident whether a federal question had been passed upon by the state court, it will be presumed that the decision was based upon state law. To the same effect, see also *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751, and *International Steel & Iron Co.*

v. National Surety Co., 297 U. S. 657, 56 S. Ct. 619, 80 L. Ed. 961. It is submitted that, applying the principle of the above discussed *Lynch* case to the present case, appellant has failed to show wherein the California District Court of Appeal or any of the other California courts passed upon a question under the federal constitution.

III.

The Instant Appeal Does Not Present a Substantial Federal Question.

It is submitted that it is evident from a reading of the pleadings in the trial court, the briefs in the appellate courts and the decisions of the trial court and of the District Court of Appeal, that the within matter was tried and determined on state issues; that the questions involving the federal constitution were presented by appellant in only one of the three state courts and even then those questions were presented in a most cursory manner and were based upon false and frivolous premises as discussed above. It is submitted that under such circumstances such questions will not be considered as *substantial* federal questions upon which to base an appeal to this Honorable Court. (*Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051; *Zucht v. King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194; *Valley Steamship Co. v. Wattawa*, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084; *United States Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876; *House v. Road Improvement District No. 2*, 266 U. S. 175, 45 S. Ct. 60, 69 L. Ed. 229).

Conclusion.

For each and every of the reasons set forth above it is respectfully submitted that the within appeal to this Honorable Court should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

On Appeal From the District Court of Appeal of the State of California.

Motion of Appellee to Dismiss Appeal and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

MOTION OF APPELLEE TO DISMISS APPEAL.

Appellee, People of the State of California, acting by and through the Department of Public Works, respectfully moves this Honorable Court to dismiss the appeal in the instant action on the grounds that there is no substantial federal question involved, and that the judgment rests on an adequate non-federal basis.

This is an appeal from a judgment in an eminent domain proceeding commenced by plaintiff, State of

California, in which Appellant-defendant claimed an interest in the property being acquired by reason of a revisonary interest therein, but the trial court found that Appellant-defendant had no interest in the property and was not entitled to any share of the award. The Court further found that defendant City of Los Angeles was the owner of the property being acquired and plaintiff has paid the amount of the judgment award to said defendant.

This motion to dismiss is based upon the fact that the California District Court of Appeal in affirming the judgment of the trial court held that:

1. the deed of 1897 conveyed 3,000 acres of land to the City of Los Angeles without condition, and that Appellant-defendant had no reversionary interest therein;

2. that the deed of 1898 described substantially the same land conveyed by the deed of 1897, together with additional contiguous land; that the 1898 deed attempted to impose conditions upon land which had previously been conveyed to the City of Los Angeles, but that such conditions were not applicable to the land conveyed by the deed of 1897; that practically all of the land sought to be acquired by the plaintiff in this action was located within the boundaries of the land conveyed without condition by the deed of 1897; and that as to the land conveyed by the deed of 1898, subject to conditions subse-

quent, there had been no violation of any condition in said deed, and hence no reversion to Appellant-defendant;

3. that the exercise of the power of eminent domain by the State of California does not constitute a breach of a condition subsequent and does not cause a reversion;

4. that if there had been a breach of condition as to the deed of 1898, then Appellant-defendant had failed to cause a forfeiture of the land by failing to make a re-entry, or its legal equivalent;

5. that Appellant-defendant could have raised all of his alleged rights by answer to the complaint in eminent domain so that no cross-complaint is necessary to protect any rights of a property owner, and under California law in an eminent domain action in which the State of California is the plaintiff, no cross-complaint as to plaintiff is permitted;

6. that the denial of the right to file the cross-complaint was also based in part upon the lateness of the attempted filing of said cross-complaint, and because of the non-justiciable issues Appellant-defendant attempted to raise therein;

7. that Appellant-defendant's attacks on the selection of the highway route and the necessity of acquiring certain property therefor, related only to the question of "necessity" which, under California law, is non-justiciable; Appellant-defendant has never at-

tacked the constitutionally-protected question of whether the property acquired was for a public use;

8. the proceeding herein followed the requirements of the California Code of Civil Procedure;

9. no evidence was offered by Appellant-defendant as to the value of his interest—the reversionary interest.

The universal rule as enunciated by the California District Court of Appeal in the instant action, and by this Honorable Court in many decisions, is that the exercise of the right of eminent domain is not an impairment of the obligation of contract.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

There Is No Substantial Federal Question Involved, and the Judgment Rests on an Adequate Non-Federal Basis.

A. Appellant-Defendant Had No Compensable Property Interest in the Property Being Acquired by Eminent Domain.

The trial court and the California District Court of Appeal found that the grant of 1897 conveyed approximately 3000 acres of land to the City of Los Angeles without any condition the violation of which would cause a reversion. Both said courts further found that substantially all of the land so conveyed was described in the deed of 1898 which attempted to impose certain conditions on the 3000 acres already conveyed to the City of Los Angeles. Such conditions, it was found, could not be made to apply to the 3000 acres already conveyed to said City of Los Angeles, *The People v. City of Los Angeles*, 179 Cal. App. 2d ....., 179 A. C. A. 629, 640, Statement of Jurisdiction, App. p. 12, and that practically all of the land sought to be acquired in the instant action, was located within the 3000 acres conveyed without condition. The courts below further found that although the grant of 1898 did contain a condition subsequent, the acts of the State were not in violation of any condition of said grant of 1898. *The People v. City of Los Angeles*, 179 Cal. App. 2d ....., 179 A. C. A. 629, 643, Statement of Jurisdiction, App. p. 16. Con-

sequently, the park did not revert to Appellant-defendant, and he was not deprived of his property without compensation. *City of Santa Monica v. Jones*, 104 Cal. App. 2d 463 (232 P. 2d 55); *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294 (206 N. Y. S. 132); *City of Buffalo v. Day*, 8 Misc. 2d 14, 17.

The further determination that in any event there had been no violation of any condition of the grant of 1898 was based on the interpretation of the language of the deed which provided that:

> "It is understood that the use of any part of said premises for . . . transportation purposes, for carrying the inhabitants of said City into and through said park, shall not be considered a violation of any of the conditions upon which this donation and grant are made, anything to the contrary thereto notwithstanding."
>
> *The People v. City of Los Angeles*, 179 Cal. App. 2d ....., 179 A. C. A. 629, 643; Statement of Jurisdiction, App. p. 16; Ex. G.

This determination of fact, that the State highway, declared a freeway, meets this exception, and was instrumental in carrying out the purposes of the grant is entitled to great weight. This Honorable Court has stated that such a determination can be rejected ". . . only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked." (*Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U. S. 287, 294.) Hence, at most, the Appellant-defendant only had a reversionary interest which had not reverted to him. Even assuming the breach of a condition by the City of Los Angeles, Appellant-defendant took no action to forfeit the es-

tate. (*The People v. City of Los Angeles*, 179 Cal. App. 2d ....; 179 A. C. A. 629, 643.)

The exercise of the right of eminent domain does not cause a reversion, and it is a widespread theory of eminent domain law that where the likelihood of reverter is remote, there may be no compensation for the taking of the interest. (*Beard's Erie Basin v. People of New York*, 142 F. 2d 487; *People of Puerto Rico v. United States*, 132 F. 2d 220, citing many cases; *First Reformed Dutch Church v. Croswell*, 210 App. Div. 294 (206 N. Y. Supp. 132 (the leading case)); *City of Santa Monica v. Jones*, 104 Cal. App. 2d 463 (232 P. 2d 55).)

Even assuming there were some compensable interest, the Appellant-defendant made no offer of proof in regard to the value of his particular interest—only as to the value of the entire fee interest. (*The People v. City of Los Angeles*, 179 Cal. App. 2d ...., 179 A. C. A. 629, 646; Statement of Jurisdiction, App. p. 21; Rep. Tr. pp. 419, 424-425.)

Therefore, Appellee respectfully contends that Appellant-defendant had no interest taken from him which was capable of valuation and furthermore that Appellant did not even offer to show any value (if there were any) to the actual interest he owned.

B. Appellant Was Afforded Full Due Process of Law.

The basic claim of Appellant-defendant seems to be that he was denied due process because he was denied leave to file a cross-complaint.

Under California law, Appellant-defendant could have raised all his alleged rights by way of answer to the complaint, so that no cross-complaint is necessary to

protect any rights of a property owner. The California Code of Civil Procedure, Section 1246, sets forth what must be pleaded in an answer in an eminent domain suit. Further, no cross-complaint is permissible in an eminent domain proceeding against the State of California as the plaintiff. (*People v. Buellton Development Co.*, 58 Cal. App. 2d 178 (136 P. 2d 793); and, after the filing of an answer, a defendant may not file a cross-complaint as a matter of right. (*The People v. City of Los Angeles*, 179 Cal. App. 2d ....., 179 A. C. A. 629, 638; Jurisdictional Statement, App. p. 9.)

One of the reasons for the denial of the leave to file the cross-complaint was the delay in moving for such leave for three years and five months. (*The People v. City of Los Angeles*, 179 Cal. App. 2d ....., 179 A. C. A. 629, 638; Jurisdictional Statement, App. pp. 8, 9.) Among other reasons, it is proper to deny a motion for leave to file a cross-complaint if the motion is untimely or if the cross-complaint is demurrable. (*Gloggan v. Hagan*, 107 Cal. App. 2d 313, 320.) Both of these reasons were present in the instant case, giving the court wide discretion in its determination that the motion should be denied. Denial of right to file a plea because of late filing has been upheld by this Honorable Court as an adequate State ground. (*Western Union Tel. Co. v. Wilson*, 213 U. S. 52.) Appellant-defendant was not prejudiced by the denial of his motion for leave to file a cross-complaint, because the proper method and procedure for setting forth the alleged interest of a defendant and its value, is by way of answer. (*People v. Buellton Development Co.*, 58 Cal. App. 2d 178.) Furthermore, the trial court permitted Appellant-defendant to file an amended answer which set forth

for consideration all justiciable matters which appellant pleaded in his proposed cross-complaint. [Rep. Tr. pp. 177, 197.] There was no denial of due process of law.

C. There Is No Impairment of the Obligation of a Contract Where a Taking Is by Eminent Domain.

This Honorable Court has held consistently that the taking of property by eminent domain does not impair the obligations of a contract. (*West River Bridge v. Dix*, 47 U. S. (6 How.) 507.) In a dissenting opinion by Mr. Justice Brennan such a claim was said to be "utterly without substance". (*Louisiana Power and Light Co. v. Thibodaux*, 360 U. S. 25 at 34.) It has also been said that the states have not, under the contract clause, divested themselves of the power to legislate in matters within the scope of their authority. (*Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U. S. 20.)

Conclusion.

Appellee respectfully moves this Honorable Court to dismiss this appeal in accordance with Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States on the grounds that the judgment rests on an adequate non-federal basis and that there is no substantial federal question involved.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960

No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

IN OPPOSITION TO MOTIONS TO DISMISS.

Appellant, Van M. Griffith, hereby opposes the motions of appellees to dismiss his appeal and makes reply thereto as follows:

I.

The Judgment Appealed From Does Not Rest Upon Any Adequate Non-Federal Basis.

Appellee's motions to dismiss fail to point out any non-federal ground upon which the decision of the California District Court of Appeal may rest. The fact is that the issues involved in this eminent domain proceeding are necessarily:

1. Whether appellant reversioner may be wholly denied compensation for the taking of the park lands which reverted to him (Point V, below);

2. Whether he has been accorded due process of law for the determination of his rights (Point VI, below);

3. Whether the state statutes passed subsequent to City appellee's acceptance of the deed of gift under the provisions of the City charter constitute impairment of the contract (Point VII, below).

> "The supreme court may not be excluded from assuming jurisdiction on the mere suggestion or conjecture that the state court rested its decision on non-federal grounds."

13 Cyc. Fed. Proc. 290, Sec. 57.189, citing

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 290, which held that

> "Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-federal point of view, therefore it was considered and decided in that aspect." (l. c. 276). See also Titus v. Wallick, 306 U. S. 282, 290f;
>
> *Dixon v. Duffy*, 344 U. S. 143;
>
> 36 C. J. S. 152, section 244, note 2.

> "Where federal ground is so interwoven with other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the court has jurisdiction."
>
> 36 C. J. S. 152, Federal Courts, Sec. 244, note 4;
>
> *State Tax Commission of Utah v. Van Cott*, 306 U. S. 511, 512f.

None of appellees' cases relating to non-federal grounds are applicable to the facts here. The Stembridge, Buck,

and Zorach cases (cited on page 8 of City appellee's motion) expressly hold that the decisions of the state courts in each of those cases rested on non-federal grounds. The Hammerstein case (there cited) was continued to enable petitioner appellant to apply to the California courts for certificate or other expression to show whether judgment involved any federal question.

We will show in the next point that the federal questions raised by appellant do not rest upon "false assumptions" of fact, as asserted by appellees, but that appellees statements of fact to the contrary are incorrect.

II.

The Federal Questions Raised by Appellant Do Not Rest Upon "False Assumptions" of Fact.

The only issues of fact disputed by appellees relate (1) to the 1897 and 1898 deeds of the park lands to the City of Los Angeles as affecting the question of reversion and right of appellant to compensation, (2) as to time of filing answers and motion for leave to file cross-complaint as affecting due process, and (3) as to evidence of value of lands taken as affecting due process. Appellees fail to point out specifically any "false assumptions" of fact upon which rest the federal questions raised by appellant (See Statement of Facts by City appellee, pp. 2-5, and by State appellee, pp. 2-4). Both appellees refer merely to the indefinite statements of fact in the opinion of the District Court of Appeal and do not cite any of the record of the trial court upon which appellant rests as to the federal questions raised by him (See Jurisdictional Statement, pp. 7-9). We now point out errors of fact in appellees' arguments.

1. As to the Relation Between the 1897 and 1898 Deeds.

Appellant contends that the 1897 deed was merged in the 1898 deed and that the latter consummated the gift of the park to the City and contains the binding and conclusive provisions and conditions of the gift (See Point V below).

It is not true that the 1897 deed conveyed 3000 acres of the park land. There was no such finding of fact by the trial court [See Finding of Fact No. VIII, Clk. Tr. pp. 102-5]. And the evidence introduced by defendant City appellee shows that less than a tenth of the 3000 acres was conveyed by the 1897 deed, and that the whole of the tract of 3015.788 acres (including all land in the 1897 deed) was conveyed by the 1898 deed and then finally accepted and dedicated as Griffith Park by the City of Los Angeles. The boundaries of the land conveyed by the 1897 deed are shown in Exhibit C as outlined in orange color and wholly enclosed within the boundaries of the land conveyed by the 1898 deed as marked by No. 2 and outlined in brown color on said Exhibit C, which is the map introduced in evidence by defendant City appellee. This is also shown by the oral evidence introduced by appellees at the trial.

It is also shown on the map Exhibit A introduced in evidence by defendant City appellee that the land taken which is claimed by appellant by right of reversion is a portion of the land conveyed by said 1898 deed. According to testimony introduced by plaintiff, appellee the land taken included 102.305 acres conveyed by said 1898 deed [Rep. Tr. p. 79]. The portion taken of the 1897 deed (also included in the 1898 deed), as shown on map Exhibit A, was only 45.907 acres.

The facts appertaining to the merger of all instruments of the park gift in the 1898 deed are the following: Offer of the gift was made by letter dated December 16, 1896 [C. T. p. 28, lines 18-23; pp. 38-39; Ex. D; R. T. p. 157, lines 21-26; p. 158, lines 1-11]. Said offer was accepted on the same day by city ordinance No. 3975 (New Series) with directions to the City Engineer to survey and establish the boundaries of the Land and to the City Attorney then to prepare the necessary conveyance [C. T. p. 28, lines 25-30, pp. 40-41; Ex. E; R. T. p. 158, lines 12-16]. A partial conveyance of a small portion of the 3000 acres was made by said 1897 deed. All of said land offered was conveyed by deed executed and delivered on March 5, 1898 [C. T. p. 28, line 32, to p. 29, line 6; pp. 42-47; Ex. G; R. T. p. 159, line 16, to p. 160, line 5], and on the same date was accepted by ordinance No. 4926 and recorded by the City [Ex. H; R. T. p. 160, lines 6-12]. It was not until said 1898 conveyance and ordinance that the transaction of gift was completed in accordance with the terms of said letter of offer Exhibit D.

As held in *Sisk v. Caswell*, 14 Cal. App. 377, 387:

> "All the prior agreements and negotiations of the parties . . . of the lands here involved were, of course, merged in the deed of conveyance, and the deed itself must . . . be the sole guide for measuring and determining the rights of the parties thereunder."

See also *Store Properties v. Neal*, 72 Cal. App. 2d 112, and *Wing v. Forest Lawn Cemetery Assn.*, 15 Cal. 2d 472, 479.

The difference in the acreage as stated in the letter of offer Exhibit D (3000 acres) and that conveyed by the 1898 deed Exhibit G (3015.788 acres) is such a material difference as in this taking of approximately 200 acres would amount to several hundred thousand dollars of damages. Besides, less than half the land here involved was conveyed in the 1897 deed (45.907 acres), while that taken of the land conveyed by the 1898 deed is 102.305 acres [R. T. p. 79]. Therefore, the provisions of the 1898 deed which conveyed only a determinable fee to the City entitle appellant reversioner to compensation for his land taken in this condemnation proceeding (see Point V below).

2. Denial of Leave to File Cross-Complaint Was Denial to Appellant of Due Process of Law.

State appellee contends "that appellant-defendant could have raised all of his alleged rights by answer to the complaint in eminent domain so that no cross-complaint is necessary to protect any rights of a property owner" (p. 3 of Motion, par. 5). Appellee's contention is in conflict with the holding of the ruling case it cites as authority on page 8 of its Motion, *People v. Buellton Development Co.*, 58 Cal. App. 2d 178. Quoting from the opinion of that case:

> "The provision for an answer in eminent domain requires the defendant to set forth therein his estate or interest in the property to be condemned, but it makes no provision for service thereof upon another defendant who may have a conflicting claim, or for the framing of issues upon such conflict-

ing claim. No doubt a statute could raise such issues without pleadings, and it would probably be within constitutional limits if it required that a defendant, after service of process to bring him into the action, be charged with notice of adverse claims upon him, in regard to the subject matter of the action, by the pleadings of any of the parties thereto. But this would be an uncertain and inconvenient procedure for framing and trying such issues, and we see no reason for placing such a construction upon a statute if another more reasonable one is permitted by its language.

"Plaintiff objects that the cross-complaint covered other land than that to be condemned, as described in the complaint, and raised issues as to the title of such other land. But it is well established that in an action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where the cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint. . . . The cross-complaint here comes well within this rule. . . . The order striking appellants' cross-complaint is reversed."

The Buellton case is on this point conclusive that only by cross-complaint could appellant-defendant contest with City-defendant their conflicting claims relative to the reversion of Griffith Park and his right to compensation for the portion taken.

State appellee also contends that it was proper to deny relief by cross-complaint because of the lateness of the attempted filing thereof and because it was not filed at the time of filing the original answer (Motion, pp. 7-9). But this contention disregards the facts that, subsequent to the filing of the original complaint praying for an injunction, plaintiff-appellee took possession of the portion of Griffith Park described in the complaint and constructed the state highway thereon [C. T. p. 102, lines 5-6, and R. T. pp. 388-391; Ex. P]; that City appellee did not file its answer until December 7, 1957, in which it opposed the taking on grounds similar to those in this defendant-appellant's answer [C. T. pp. 68-69]; but that one year later City defendant-appellant abandoned those defenses and consented and acquiesced in said taking by Resolution of its Board of Recreation and Park Commissioners No. 2859 (adopted December 11, 1958 [R. T. p. 422] and by City Ordinance No. 107485, adopted January 8, 1959 [R. T. p. 433]. Very soon thereafter on January 19, 1959, defendant-appellant filed motion for eave to file his proposed cross-complaint [C. T. pp. 153-164], which motion was denied [C. T. p. 165]. Defendant-appellant's motion for leave to file said cross-complaint was obviously timely, and it was an abuse of discretion to deny his said motion, and thereby he was deprived of due process of law (See also Point VI below).

Inasmuch as a clear abuse of discretion appears here, the cited case of *Glogau v. Hagan*, 107 Cal. App. 2d

313, 320, is not in point here, as to untimeliness of filing cross-complaint, but that case does recognize the principle that abuse of discretion is ground to defeat the trial court's adverse ruling.

3. Exclusion of Evidence of Value of Lands Taken Denied Appellant Due Process of Law.

It is not true that appellant offered no evidence as to the value of his interest. All evidence as to value was excluded on the ground that defendant-appellant had no title to the land and was therefore not concerned as to the value of the land (R. T. pp. 424-430; p. 382, lines 7-12; p. 409, lines 17-26; p. 413, lines 2-23; p. 11, lines 19-22; p. 329, lines 16-22; pp. 410-421).

For the 200 acres of park land taken the City settled for $3,750,000.00 by stipulation and agreement with the State, and no evidence was taken as to the actual value of the land. Presumably on that basis defendant-appellant's interest was worth more than one million dollars.

However, in this appeal the issue is not as to the value of his interest but as to whether he had his day in court and due process as guaranteed by the Constitution of the United States.

III.

A Substantial Federal Question Is Presented by This Appeal.

City appellee admits that "At page 9 of his Statement of Jurisdiction appellant refers to the first point at which we can agree that he raises a federal question", and then makes a condensed statement of the three grounds for federal jurisdiction of this case as urged by appellant (p. 11 of City Appellee's Motion to Dismiss).

As to whether paragraphs 1, 2, 3, and 4 are relevant as showing that appellant raised federal questions prior to assignments of error in his Opening Brief, we think the following authorites are pertinent:

> "Where a federal question has actually been considered and decided by the state court of last resort, the time at which the method by which such question was presented is immaterial as bearing on the right to a review in the United States Supreme court."
>
> 36 C. J. S. 177, Federal Courts, Sec. 274, note 36, citing:
>
> *Herndon v. Lowry*, 301 U. S. 42, 247;
>
> *Charleston Fed. S. & L. Assn. v. Alderson*, 182 U. S. 182, 185f.

> "A federal question is substantial which requires analysis and exposition for its decision, even though on the merits it may be decided against appellant:"
>
> *Milheim v. Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 716f;
>
> *Louisville & N. R. Co. v. Melton*, 218 U. S. 34, 49;

36 C. J. S. 150, Federal Courts, Sec. 243, note 94;

13 Cyc. Fed. Proc. 248, Sec. 57.157, note 1.

Appellees have failed to show that there is no substantial federal question or that a federal question has not been sufficiently raised.

IV.

The State Court's Decision Necessarily Involves the Three Federal Questions Raised, and It Actually Passed Upon Them.

"Whether a state court decided a federal question is, in itself, a federal question, which the supreme court determines from an examination of the record."

36 C. J. S. 152, Federal Courts, Sec. 244, note 99;

Lovell v. City of Griffin, 303 U. S. 444, 450, and cases cited;

Honeyman v. Hanan, 300 U. S. 14, 18.

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded."

Niemotko v. State of Maryland, 340 U. S. 268, 271;

Feiner v. New York, 340 U. S. 315, 316.

"A state court cannot, by resting its judgment on some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the

United States, in a case where the federal question was so involved that its determination was necessary to the disposition of the issue."

36 C. J. S. 152, Federal Courts, Sec. 244, note 27;

Titus v. Wallack, 306 U. S. 382, 290, 292;

Ward v. Love Co., 253 U. S. 17, 22f;

13 Cyc. Proc. 293, Sec. 57.191, note 91, citing:

West Chicago St. R. Co. v. Illinois ex rel., 201 U. S. 506, 519f;

Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, 579-80.

"The supreme court will review a federal question, although it was not put in question by the pleadings or directly passed on in the opinion, where it is apparent both from the pleadings and the record that the decision of the state court could not have been reached except by disposing of such question."

36 C. J. S. 152-3, Federal Courts, Sec. 244, note 5;

Toledo, St. L. & W. R. Co., 236 U. S. 454, 457;

International Harvester Co. v. Missouri, 234 U. S. 199, 207.

In a condemnation suit it is unescapable that the taking of land without compensation of a reversioner's interest is prohibited by the United States Constitution, and is under the aforesaid authorities a federal question, notwithstanding silence of the state court's decision after the question had been raised. The denial of

right to compensation also constitutes denial of due process of law. Here too the pleadings stated facts showing the impairment of the contract of gift by the subsequent legislation which was held valid in the lower courts. These federal questions are therefore necessarily involved in the decision appealed from.

Under the next three points appellant will show that, in conformity with the rules stated in the authorities cited by appellees (p. 11 of City Appellee's Motion), appellant has unmistakably declared in the state courts that he invoked, for the protection of his rights the provisions of the 14th Amendment and section 10 of Article 1 of the United States Constitution.

V.

Appellant Sufficiently Raised the Federal Question of His Right to Compensation as Reversioner of the Park Land Taken.

1.

In his original answer appellant alleged his reversionary right [C. T. p. 29, pars. IV and V], the illegality of the attempt to take the park land [C. T. p. 32, pars. VIII, IX, and XI], and prayed for an injunction against the taking [C. T. p. 37].

In the proposed cross-complaint which he moved the court for leave to file, for a first cause of action he alleged ownership of the lands conveyed to the City by said 1898 deed and sought to quiet title thereto against the City and State appellees herein [C. T. pp. 154-5, pars. I, II, and III]. For a second cause of action he alleged that plaintiff-appellee had taken a portion of said park land [103.305 acres; C. T. p. 155, par. II]

and had completed construction of said freeway thereon [C. T. p. 156, par. V], that said taking is in violation of the law and the City Charter (par. VI), is not for a more necessary public use (par. VII), that the act of the California Department of Public Works in said taking was an abuse of discretion, arbitrary, capricious, (par. VIII), ultra vires and without legal right and in violation of the 14th Amendment of the Constitution of the United States [C. T. pp. 156-7, par. IX]. Said proposed cross-complaint also alleged the conspiracy of said City in said illegal taking by not defending against said taking [par. XII, C. T. p. 158] and by permitting and agreeing to said taking by ratification and approval by the City Council on January 8, 1959, of settlement for damages in the sum of $3,750,000.00 [C. T. p. 159, par. XIII]. Said cross-complaint further alleged that defendant Griffith as owner of the determinable fee [C. T. p. 159, pars. XIV and XV] was damaged by the said taking [C. T. pp. 162-3, par. XVII] and prayed for quieting of title and for damages for the taking of the lands for the freeway [C. T. p. 163].

At the Pre-trial Conference defendant-appellant again claimed right to cross-complain and that the denial of his motion for leave to file cross-complaint denied him his day in court to assert his claim for damages as reversioner of the determinable fee of said park lands [C. T. pp. 180-1], and at the trial he continued to demand his right to cross-complaint [R. T. pp. 28-38, which was denied him [R. T. p. 145].

Defendant Griffith gave due Notice of Appeal from the Order denying his right to cross-complaint [C. T. p. 176].

City appellee admits that this federal question was duly raised in appellant's Opening Brief in the District Court of Appeal (City appellee's Motion to Dismiss, p. 11). (See Jurisdictional Statement, p. 9, par. 5(a).)

2. Appellant Is Denied His Property Right of Reversion.

The state court's erroneous construction of the 1898 deed deprives appellant of his right as reversioner of the determinable fee to compensation as required by the 14th Amendment of the United States Constitution for the taking in eminent domain of said park lands.

The decision of the California District Court of Appeal is on this point in conflict with California law as heretofore established and with the general law. The court erroneously construes the reversionary clause as a condition subsequent and holds that the title has not reverted to him because of the taking and he is not entitled to compensation (Appendix Opinion, pp. 13-16).

The provision of the 1898 deed that "*whenever* said tract of land hereby conveyed, or *any part* thereof *shall cease to be used as a park; . . . then the lands* hereby conveyed *shall immediately . . . revert,*" is, as the precedents and authorities uniformly hold, the apt expression of a determinable fee.

In 18 Cal. Jur. 2d 395, Estates, Sec. 1, the distinction between a determinable fee and a condition subsequent is defined with recitation of phrases construed in California cases, as follows:

> "Phrases such as 'in case . . . then,' 'should . . . then', 'in the event . . . then', 'while', 'so long thereafter as' indicate a determinable interest. On

> the other hand, prases such as 'if', 'on condition', 'failure . . . shall give . . . the right' import estates on condition."

The appellate court's opinion (Appendix p. 13) cites the irrelevant Sec. 45, p. 140, of Restatement of Law, Property. The California Annotations of that authority state that the California law is "in accord" with it (pp. 31 and 35). As it states the difference between a determinable estate and a condition subsequent is that a fee simple determinable estate "automatically expires upon the occurrence of an event" (Rest. Prop., Sec. 44(b), p. 121), while a fee simple upon condition subsequent requires a re-entry to terminate the estate (Rest. Prop. Sec. 45, p. 133ff). In said Sec. 44 (comment 1, pp. 128-9) is listed "words appropriate to express automatic expirations", which are similar to those above quoted from 18 Cal. Jur. 2d 395, as indicating a determinable estate as distinguished from a condition subsequent. Paragraph V of said comment 1 (p. 129) is substantially the exact clause contained in the 1898 deed, to-wit:

> V. "to B and C (trustees of a school district) and their heirs and successors for school purposes and to revert to the grantor when it ceases to be so used".

But, even if a condition subsequent, appellant is entitled to compensation under the facts of this case. For, as held in *Firth v. Los Angeles Pacific Land Co.*, 28 Cal. App. 399, under the provisions of section 1109 of the California Civil Code, a formal re-entry upon the land in the case of a condition subsequent is not necessary, and "determination of the grantor to take ad-

vantage of the condition broken . . . would also be well manifested by the bringing of an action to have declared the estate of the grantee terminated." Therefore, appellant's Supplemental Answer [C. T. pp. 93-96] constitutes the demand provided for in said section 1109 of the Civil Code. Furthermore, City, appellee was put on notice of the nature of appellant's demand by his answer [C. T. pp. 24-60] and especially by appellant's motion for leave to file cross-complaint [C. T. pp. 153-164], which latter was served on City appellee on January 19, 1959, and which asserted appellant's fee title by reversion [par. XIV, C. T. p. 159].

As we have shown above, (Point II, par. 1), the provisions for reversion in the 1898 deed (which merges the 1897 deed) are controlling.

The appellate court's opinion (Appendix pp. 18-21) disregards the essential point that the reversion occurred before the plaintiff-appellee acquired title by eminent domain and therefore the reversioner was entitled to compensation. As held in *People v. Peninsula Title Guaranty Co.*, 47 Cal. 2d 29, title does not pass to the condemnor until entry of the final judgment and payment of compensation. See also:

Calif. Code Civ. Proc., Sec. 1253;

City of Long Beach v. Aistrup, 164 Cal. App. 2d 1;

Las Altos School District v. Watson, 133 Cal. App. 2d 447;

Russakov v. McCarthy Co., 206 Cal. 682.

The facts of this case distinguish it from the cases cited in state appellee's brief (pp. 6-7). Here the tak-

ing in eminent domain became effective upon taking of possession and the construction of the freeway was complete before trial, and the acts of City appellee in assisting and consenting to said condemnation constituted an abandonment by the City of that portion of the park taken for the freeway, and all this occurred before the trial and before plaintiff appellee acquired title by final judgment and payment of compensation. These differing facts place this case in the class of those cases which have awarded compensation to a reversioner upon the taking in eminent domain, namely:

Romero v. Department of Public Works, 17 Cal. 2d 189, which is distinguished in *Santa Monica v. Jones*, 104 Cal. App. 2d 463;

United States v. 2,184.81 Acres of Land, 44 Fed. Supp. 681;

Harris v. Elliott, 10 Pet. (U. S.) 25, 55 *et seq.*;

In re Opening and Extending of North Conduit Avenue, 262 App. Div. 70, 27 N. Y. S. 2d 841, which distinguishes *First Reformed Dutch Church v. Crosswell*, 206 N. Y. S. 132 (cited by state appellee, pp. 6-7);

Porter v. International Bridge Co., 206 N. Y. 234;

James v. Gulf Refining Co., 206 Miss. 781;

Lancaster School District v. Lancaster County, 265 Pa. 112.

Appellees contend that the clause in the 1898 deed making an exception "for the use of any part of said

premises for transportation purposes, for carrying inhabitants of the City into and through said park" as authority and permission to take approximately 200 acres of the park for state freeway purposes, and the appellate court says this "use appears to be one excepted under the deed." But, as said by the Court in *Griffith v. Department of Public Works*, 141 Cal. App. 2d 376:

> "It is difficult to believe that the Griffith donors ever intended that this provision should be interpreted as furnishing authority for construction of a public, high-speed freeway which would remove 206 acres of land from the original park purpose."

Only appellant offered testimony on this issue. Appellant (the donors' son) testified about the efforts of his father to maintain bus lines and street railway service to and from the park [R. T. p. 344, lines 12-21]. Mrs. Harold Morton, president of the Board of Recreation and Park Commissioners testified that said Board strenuously opposed the taking of the park lands for the state freeway project [R. T. pp. 232-235; and Exs. G-A, G-B, G-C, G-D, G-E, G-F, G-H, G-I, G-J, and G-L], that the construction destroyed park facilities in the area taken for the freeway [R. T. pp. 268-281], that the Board had to purchase other land to replace that taken [R. T. p. 329, lines 16-22], and that Riverside Drive taken and appropriated for the freeway had provided adequate roadway facilities for access to the park [Ex. G-B; R. T. p. 232, lines 9-16].

California cases have uniformly held that use of park land for a street is not a use for park purposes:

Olmstead v. City of San Diego, 124 Cal. App. 14;

Hall v. Fairchild, 66 Cal. App. 615, 621 *et seq.;*

Mulvey v. Wangemheim, 23 Cal. App. 268, 272;

Griffith v. Department of Public Works, 141 Cal. App. 2d 376.

"The terms of such a grant should be strictly construed."

Griffith v. Department of Public Works, supra.

"It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose."

Roberts v. City of Palos Verdes Estates, 93 Cal. App. 2d 545, 547.

It is obvious that the donors meant by this transportation clause to provide for transportation into and through the park to make it accessible to the City's inhabitants, and not that land should be taken from the park and diverted to other and inconsistent uses such as that for the Golden State Freeway.

It is certainly straining and stretching the terms of the grant and dedication of Griffith Park to read into them the intent that said park land by virtue of said transportation clause was meant to provide for the wholly inconsistent and different use of a major state highway and freeway.

VI.

This Taking Is in Violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Appellee City admits that appellant duly raises the federal question that "The taking of Griffith Park lands for state freeway purposes violates the due process clause of the 14th Amendment to the United States Constitution." (P. 11 of its brief and Motion).

Appellant's Statement of Jurisdiction sets four grounds upon which he claims he has been denied due process of law, to-wit:

(a) "by denial of leave to file cross-complaint (see subdivision 2 of Point II above) which was passed upon by the District Court of Appeal (Appendix opinion, pp. 8-9). By denial of leave to file cross-complaint appellant was denied right to contest title with City appellee."

(b) by the arbitrary and ultra vires action of the California Highway Commission and the Department of Public Works, appellant was denied due process of law. This ground was pleaded in defendant appellant's original answer [par. VIII, C. T. p. 31; par. X, C. T. p. 33; par. XI, C. T. p. 34; par. XIII, C. T. p. 37]. This ground was also pleaded in the cross-complaint he was not given leave to file [par. VIII, C. T. p. 156; par. IX, C. T. pp. 156-7]. Appellant assigned as error the exclusion of evidence thereof (Point XVIII, of AOB. pp. 35-39), and as violation of the due process clause of the 14th Amendment (AOB. Point XX, pp. 38-39); and the appellate court passed on this question (Appendix

opinion, pp. 9-10). This has been held ground of denial of due process of law:

Davidson v. New Orleans, 96 U. S. 97, 108;
Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, 523 *et seq.*

(c) by taking for state highway public park lands of defendant City appellee not in conformity with the procedural requirements of section 1240 of the California Code of Civil Procedure as to eminent domain proceedings. This ground was assigned as error (AOB, Point I, pp. 15-16) and as in violation of the 14th Amendment (AOB, Point XX, pp. 38-39); and the District Court of Appeal passed upon it (Appendix opinion, p. 5). Failure to follow procedural requirements is denial of due process.

Marin County Water Co. v. Marin County, 145 Cal. 586.

(d) by exclusion of evidence of value of land taken. See subdivision 3 of Point II, *supra*. This ground was passed upon by the appellate Court (Appendix opinion, p. 19). It constitutes denial of due process.

Olson v. United States, 292 U. S. 246, 259.

(e) Compensation is also an element of due process.

Delaware, L. & W. R. Co. v. Town of Morristown, 276 U. S. 182, 190, 193.

See Point V, *supra*, for the manner in which this ground was raised and passed upon.

Denial of due process of law to appellant on these several grounds has bearing upon the other federal questions raised by appellant in that it has prevented due consideration of his rights as reversioner and a fair trial of the issues in this case.

VII.

Said Taking Constitutes Impairment of the Obligation of the Contract of Gift as Resting Upon Subsequent Legislation Prohibited by Section 10 of Article I of the Constitution of the United States.

City appellee admits that appellant has duly raised a federal question that "The enactment of section 103.5 of the Streets and Highways Code and the adoption by the State Highway Commission of a resolution authorizing the condemnation of Griffith Park lands for a state freeway impairs the obligation of a contract in violation of Article 1, section 10 of the United States Constitution." (Its Motion, p. 11.) And also that the District Court of Appeal passed upon the question (Its Motion, pp. 11-13). The cases cited by appellees are not in point here, because the record discloses that not only was the federal question presented to the highest court, but also it is necessarily involved in the decision. Appellant's Opening Brief is a part of the record because in California practice it presents the assignments of error (Appendix opinion, p. 3). As we have shown in points III and IV above, in this case and passim, the fact that the opinion of the District Court of Appeal has not specifically stated that the constitutional question involved is a federal question is immaterial.

As to the instant federal question of impairment of contract, the opinion of the District Court of Appeal (Appendix, pp. 16-17) evades and misstates the point of appellant's assignment of error. It is that the taking under the supposed authority of section 103.5 of the Streets and Highways Code authorizing the resolution of the State Highway Commission and Resolution No. 2859 and Ordinance No. 107485, all of which are state

statutes passed subsequent to the gift of the park land made inviolate by the City Charter (section 113) in force at the time of the grant and by the California Constitution (section 8 of Article XI) not repealable by any act of the state legislature, constitutes impairment of a contract prohibited by section 10 of Article I of the United States Constitution. (Jurisdictional Statement, par. III, pp. 5-6; par. 2, p. 7; par. (c), p. 9; p. 12; par. 3, pp. 14-15; pp. 15-16, as to statutes involved; and par. 2, p. 17).

The cases cited in the appellate court's opinion (Appendix, p. 17) and by appellees (state's Motion, p. 9) are distinguishable in fact and not applicable in principle to this case. They merely hold that the state cannot by contract divest itself of the power of eminent domain, nor does the United States Constitution take away from the states the power of eminent domain. That is not the issue here.

The authorities cited do not hold, and it is no. the law, that there is no limitation upon the power of eminent domain.

County of Marin v. Superior Court, 53 A. C. 638, 2 Cal. Rep. 758.

The issue here as to taking of the park land has two phases: first, as to the contract obligations of the City which is not the condemnor; and second, the constitutional and statutory limitations upon the State in the taking of park of the City of Los Angeles already appropriated to a public use.

Appellant contends that the consent of the City is essential and precedent to the right of the State to take the park land which was already appropriated to a public use inconsistent with use for a state freeway. And

the City's consent thereto is subject to the contract and the prohibition of the City Charter. In giving its consent and acquiescing to the taking of the park for the freeway in this case, the City appellee acted without authority, breached its trust and *impaired the contract* and caused a reversion to appellant. By upholding the validity of the City's unlawful act by ordinance and resolution (Appendix, pp. 7-8), a federal question is necessarily involved which has been duly raised by appellant.

On the other hand, the power of eminent domain is limited by the California Constitution (section 13 of Article XI) which prohibits delegation of power to a special commission (such as is the California Highway Commission) to take property of a municipality. As interpreted by the District Court of Appeal said section 103.5 is a valid delegation of power to the State Highway Commission to take City property. (Appendix, pp. 4-8). As we will next show, this involves not only the question of the delegation of legislative power to a state agency (*Griffith v. Department of Public Works*, 141 Cal. App. 2d 376), but also the question of the impairment of a contract which in this case is constitutionally inviolate.

The Charter of a city under the California Constitution (Section 8 of Article XI) cannot be repealed, altered or amended by any act of the state legislature without the consent of the municipal electorate as there prescribed. Section 113 of the City Charter is a part of the terms of the contract of gift of Griffith Park and forbids diversion of such a dedicated park from the purposes dedicated. By the terms of the grant any change of use immediately effects reversion. As we have shown, the act of taking these park lands by the Cali-

fornia Highway Commission and Department of Public Works is *ultra vires* and an impairment of said contract. The decision of the District Court of Appeal upholding the validity of the said legislative acts of appellees constitutes those acts impairment of the contract, and this is a federal question involved in the other federal question of right to compensation raised by appellant.

Conclusions.

The cases cited by City appellee's Moton on page 13 are entirely irrelevant to this appeal. For the federal questions raised here are neither frivolous, false, insufficiently raised, nor determinable on non-federal grounds, as in those cases, and they are either expressly or impliedly and necessarily involved in the questions passed upon by the decision of the California District Court of Appeal.

The issue now presented by the motions to dismiss is merely whether a federal question is presented. Therefore, we have not attempted to argue fully the merits of the case. We think we have proved that the federal questions have been sufficiently raised by appellant and passed upon by the state court, and that the motions to dismiss should be denied.

Respectfully submitted,

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Attorney for Appellant.

ARTHUR E. BRIGGS,

Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1960
No. 457

VAN M. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellee,

CITY OF LOS ANGELES, a municipal corporation, *et al.*,

Appellees.

PETITION FOR RECONSIDERATION.

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PETITION FOR RECONSIDERATION.

Appellant respectfully requests this Honorable Court to reconsider its dismissal of appeal made on the ground of want of a substantial federal question.

We think that the points made and authorities heretofore cited, in our Statement of Jurisdiction and In Opposition to Motions for Dismissal, are sufficient; but assume that the Court questions whether the matter of this action attains the importance of a widespread interest and fundamental right to warrant the Court's attention.

We are informed of a general complaint throughout the United States against state highway commissions and agents for taking and diverting park lands to highway and freeway purposes. A case similar to ours at Chino, California, led a firm of attorneys there to file in the California Supreme Court an *amicus curiae* brief herein. Attorneys Black, McCuskey, Souers & Arbaugh, of Canton, Ohio, advise us of an exactly similar situation there in which they represent the reversionary interest. They learned of the pendency of this appeal from the digest in United States Law Week.

That this is a matter of nation-wide concern is emphatically stressed in the Editorial of the *Saturday Evening Post,* December 10, 1960, which refers to article by Alfred Balk in the October, 1960, number of the *National Civic Review.* Mr. Balk's informative article is republished in condensed form in *Reader's Digest* of November, 1960 (pp. 267ff).

But, as we have shown, this instant case is of more substantial federal import than the facts recited in said articles. Before the commencement of this action in eminent domain this appellant brought an action to enjoin the proceeding of the Department of Public Works, *(Griffith v. Department of Public Works),* and had two decisions of the California District Court of Appeal in his favor (146 Cal. App. 2d 376 and 338 P. 2d 920), but later decision was reversed by the Supreme Court on the ground of *fait accompli* (52 Cal. 2d 848); for, notwithstanding the pendency of said injunction suit,

the Department of Public Works proceeded with the taking of the park lands and the construction and completion of the Golden State Freeway thereon.

Thus, appellant's attempt to preserve the Griffith Park lands was defeated. In this eminent domain action he was therefore compelled to pursue the only remedy left to him, namely, to claim damages for the taking.

We submit that our briefs have clearly shown that appellant is entitled to reversal of the decision appealed from on the federal grounds of impairment of contract, denial of due process of law, and taking without compensation of appellant's reversionary interest, and that a substantial federal question is involved.

Respectfully submitted,

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